

THE
PRINCIPLES
OF THE
LAW
OF
SCOTLAND:

In the Order of Sir GEORGE MACKENZIE'S
Institutions of that Law.

VOLUME II.

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BOOK III.

TIT. I. *Of Obligations and Contracts in general.*

THE law of heritable rights being explained, moveable rights fall next to be considered, the doctrine of which depends chiefly on the nature of obligations. An obligation is a legal tie, by which one is bound to pay or perform some thing to another ; and in relation to the creditor, it is called a personal right. * The ruling difference betwixt a real and a personal right is, that the first confers a *jus in re*, a right in the thing itself, whereby the person who has the right is

Vol. II. A intitled

intituled to possess it as his own; or, if he is not in possession, to demand it from the possessor: whereas the creditor, in an obligation or personal right, has only *jus ad rem*, or a right to compel the debtor to fulfil his obligation, without any right in the subject itself which the debtor is bound to transfer or deliver to him.

Are either
merely natural,

2 Obligations are either, first, merely natural, where one person is bound to another by the law of nature, but cannot be compelled, by any civil action, to the performance. Thus, tho' deeds granted by a minor having curators, without their consent, are null, yet the minor is naturally obliged to perform such deeds: and parents are naturally obliged to provide their children in reasonable patrimonies. Natural obligations had, by the *Roman* law, most of the effects of proper ones, except the right of action: by ours, they intitle the creditor to retain what he has got in virtue thereof, without being subjected to repetition, (3. 3. 17.) and a fidejussory obligation may be interposed to them, (3. 3. 24.)

Merely civil,

2. Obligations merely civil; which, tho' they may be sued by an action, are elided by an exception in equity: this is the case of obligations granted by force or fear, &c.

Or mixed.

3. Proper or full obligations, which are supported both by natural equity and the civil sanction.

They are
either
pure.

In diem.

3. Obligations may be also divided into, 1. Pure, to which neither day nor condition is adjected. These are exigible immediately, l. 41. §. 1 *de verb. obl.* 2. Obligations (*in diem*) which have a day adjected to their performance. In these, *dies statim cedit, sed non venit*: a proper

per debt arises, from the date of the obligation, because it is certain that the day will exist; but the execution is suspended, till the lapse of that day. 3. Conditional obligations, in which there is no proper debt (*dies non cedit* till the condition be purified, because it is possible the condition may never exist; and which therefore are said to create only the hope of a debt; §. 4. *inst de verb. obl.* but the granter even of these has no right to refile. An obligation, to which a day is adjected that possibly may never exist, implies a condition, *dies incertus pro conditione habetur*, l. 21. pr. *quando dies leg.* thus, in the case of a provision to a child, payable when he attains to the age of fourteen, if the child dies before that age, the provision falls; 16. Feb. 1677, *Belfches*.

4. Obligations, when considered with regard to their cause, were divided by the *Romans* into these arising from contract, *quasi* contract, delict, and *quasi* delict; but there are certain obligations, even full and proper ones, which cannot be derived from any of these sources, and to which the Visc. of *Stair* gives the name of *obediential*. Such is, among others, the obligation of parents to aliment their children, which arises singly from the relation of parent and child, and may be enforced by the civil magistrate, l. 5. §. 10. *de agn. lib.* Under parents are comprehended the mother, grandfather and grandmother, in their proper order, d. l. 5. §. 2. In consequence thereof, the parents are obliged to provide their issue in all the necessaries of life, and to give them suitable education, d. l. 5. §. 12. It ceases, when the children can earn a livelihood.

Or conditional

Obediential obligations.

Obligation of aliment.

hood by their own industry; but the obligation on parents to aliment their indigent children, and reciprocally, on children to aliment their indigent parents, is perpetual, *l. ult. §. 5. C. de bon. quae lib.* This obligation is not personal to the father, but is transferred to the eldest son, the heir of the family, as representing him, in respect to his younger brothers and sisters: he must aliment his brothers untill their age of 21, after which they are presumed able to do for themselves; but the obligation to aliment the sisters continues, till their settlement by marriage, 8. Feb. 1739, *Douglasses*. In persons of lower rank, the obligation to aliment the sisters will continue no longer, than till they are capable to go to an employment or service.

Obligations arising from the duty of restitution.

5. All obligations, arising from the natural duty of restitution, fall under this class: thus, things given upon the view of a certain event must be restored, if such event does not afterwards exist, *tit. de cond. causa data; e. g.* what is given in contemplation of a marriage which never followed: thus also, things given *ob turpem causam*, where the turpitude is in the receiver and not in the giver, must be restored to the owner, *l. 1. §. 2. de cond. ob turp. caus.* and on the same principle, one upon whose ground a house is built *bona fide* by another, is obliged, without any covenant, to repeat to the builder the expence of building, in so far as it has been profitable, 23. Feb. 1665, *Jack*.

Obligations by contract.

6. A contract is the voluntary agreement of two or more persons, whereby something is to be given or performed upon one side, for a valuable consideration, either present or future,

ture, on the other part. Consent, which is implied in agreement, is excluded, 1. By error in the essentials of the contract, *l. 15. de jurisd.—l. 9. pr. de contr. empt.* for in such case, the party does not properly bargain, but errs or is deceived: and this may be also applied to contracts which take their rise from fraud or imposition. 2. Consent is excluded, by such a degree of restraint upon any of the contracting parties, as extorts the agreement; for, where violence or threatnings are used against a person, his will has really no part in the contract. Contracts were, by the *Roman* law, perfected, either *re*, by the intervention of things, or by words, or by writing, or by sole consent. In order to perfect *real* contracts, one of the parties must have actually given or performed something to the other: if there was barely an obligation to give or perform, it resolved into a *nudum pactum*, which was not productive of an action; but, by our law, one, who obliges himself to lend or give in pledge, may, by a process, be compelled to the performance. The real contracts of the *Romans* are loan, commodate, depositation and pledge. 7. Loan or *mutuum* is that contract, which obliges a person, who has got any fungible from another, to restore to him as much of the same kind, and of equal goodness. What ever receives its estimation in number, weight or measure, is a fungible, as corn, wine, current coin, &c. The only proper subjects of this contract are things which cannot be used, without either their extinction or alienation; hence, the property of the thing lent is necessarily transferred by delivery to the borrower, who

Real contracts.

Mutuum.

Its proper subjects.

The obligations.

And action arising from it.

Commodate.

What degrees of diligence are required in contracts.

who consequently must run all the hazards of its deterioration or perishing, according to the rule, *res perit suo domino*. Where the borrower neglects to restore, at the time and place agreed on, the estimation of the thing lent must be made, according to its price at that time and in that place; because it would have been worth so much to the lender, if the obligation had been duly performed. If there is no place nor time stipulated, the value is to be stated, according to the price the commodity gave, when and where it was demanded. In the loan of money, the value put on it by public authority, and not its intrinsic worth, is to be considered. This contract is obligatory only on one side, for the lender is subjected to no obligation; the only action therefore that it produces is pointed against the borrower, that he may restore as much in quantity and quality as he borrowed, together with the damage the lender may have suffered through default of due performance.

8. Commodate is a species of loan, where the thing lent may be used, without either its perishing or its deterioration. Hence, in this sort of loan, the property continues with the lender; the only right the borrower acquires in the subject is its use, after which, he must restore the individual thing that he borrowed: consequently, if the subject perishes, it perishes to the lender, unless it has perished by the borrower's fault. What degree of fault or negligence, makes either of the contracting parties liable to the other in damages, is comprehended under the following rules. Where the contract gives a mutual benefit to both parties, each

each contracter is bound to adhibit a middle sort of diligence, such as a man of ordinary prudence uses in his affairs, the neglect of which is called *culpa levis*. Where only one of the parties has benefit by the contract, that party must use exact diligence, the opposite of which is *culpa levissima*; and the other, who has no advantage by it, is not liable to any proper diligence, and is accountable only *de dolo vel culpa lata*, for dole, or for gross omissions which law construes to be dole. Where one employs less care on the subject of a contract, than he is known to employ in his own affairs, it is considered as dole.

9. By these rules, the borrower in commodate, if the contract be solely for his benefit, which is generally the case, must be exactly careful of the thing lent; and restore it at the time fixed by the contract, or after that use is made of it for which it was lent: if he puts it to any other use, or neglects to restore it at the time covenanted, and if thereby the thing perishes even by mere accident, he is bound to pay the value. On the other hand, the lender is obliged to repeat to the borrower, such of the expences disbursed by him on the subject, as arose from any uncommon accident, but not these that naturally attend the use of it, l.

Obligations arising from commodate.

18. §. 2. *commod.* The essential obligations consequent on this contract lie upon the borrower: the action therefore competent to the lender against him for fulfilling his part, is called the direct action of commodate; and that, which is competent to the borrower upon the counter-part of the contract, is called the contrary action. Where a thing is lent gratuitously,

The direct and contrary actions of commodate.

tously, without specifying any time of redelivery, it constitutes the contract of *precarium*, which is revokable at the lender's pleasure, and being entered into from a personal regard to the borrower, ceases by his death, *l. 12. §. 1. de prec.*

Deposition.
tion.

The obligations arising from it.

10. Deposition is a contract, by which one who has the custody of a thing committed to him (the depositary) is obliged to restore it to the depositor. If a reward is taken by the depositary for his care, it resolves into the contract of location. This contract being gratuitous, the depositary is only answerable for the consequences of gross neglect; but after the deposit is redemanded, he is accountable even for casual misfortunes. He is intitled to a full indemnification for the losses he has sustained by the contract, and to the repetition of all expences disbursed by him on the subject; but he had no right by the civil law to retain the subject itself for his reimbursement; the exuberant trust which was implied in the contract, excluded all right, both of compensation and retention, *l. 11. C. depos.*

Nautae,
caupones,
stabularii.

11. By an edict of the *Roman* Praetor, which is with some variations adopted into our law, an obligation arises without formal paction, barely by a traveller's entering into an inn, ship or stable, and there depositing his goods or putting up his horses; whereby the innkeeper, shipmaster or stabler, is accountable, not only for his own facts and these of his servants, (which is an obligation implied in the very exercise of these employments) but of the other guests or passengers; and, indeed, in every case, unless where the goods have been lost

lost *damno fatali*, or carried off by pirates or robbers. This edict, so contrary to common rules, was found necessary *ad reprimendam improbitatem hoc genus hominum*, l. 3. §. 1. l. 1. §. 8. *naut. caup.* Not only the masters of ships, but their employers, whether owners or freighters, are liable upon this edict, l. 1. §. 2. *cod.* but, by the present custom of trading nations, goods brought into a ship do not fall under it, unless they are delivered to the master or mate, or entered into the books or bills of lading. Common carriers fall within the intendment of this edict; and practice has extended it to vintners within burgh, *F. 25. July 1704. Hay.* The damage sustained by the party may be proved by his own oath *in litem*, 4. *Dec. 1661, White.*

12. Sequestration, whether voluntarily consented to by the parties or authorized by the judge, is a kind of deposit: but, as the office of sequestree, to whose care the subject in dispute is committed, is not considered as gratuitous, he cannot throw it up at pleasure, as a common depositary may do; and he is liable in the middle degree of diligence. Sequestration. Confignation of money is also a deposit. Confignation. It may be made, either where the debt is called in question by the debtor, as in suspensions, or where the creditor refuses to receive his money, as in wadssets, &c. The risk of the consigned money lies on the consigner, where he ought to have made payment, and not on the consignation, 9. *July 1675, E. Queensbury*; or has consigned only a part; or has chosen for consignatary, a person neither named by the parties nor of good credit. On whom the risk of the consigned money lies. The VOL. II. B charger

Configned
money
ought not
to be put to
interest.

charger or other creditor runs the risk, if he has charged for sums not due, or has, without good reason, refused to accept payment, where- by the consignation became necessary, 28. *Ju- ly 1665, Scot.* It is the office of a consigna- tary, to keep the money in safe custody, till it be called for; if therefore, he puts it out to interest, he must run the hazard of the deb- tor's insolvency; but, for the same reason, tho' he should draw interest for it, he is liable in none to the consigner, see 3. 9. 21. *ad fin.*

Pledge.

13. Pledge is a contract by which a debtor puts into the hands of his creditor, a special subject in security of the debt, to be redeliver- ed on payment. Where a security is establish- ed by law to the creditor, upon goods which continue in the debtor's possession, it has the special name of an hypothec. Of these there was a great variety among the *Romans*, but our law has, for preserving the free currency of trade, reduced them to a narrower com- pass. Merchants and ship carpenters have a hypothec on the ship repaired, for the materi- als and other charges of reparation, 16. *Nov. 1711, Watson*; but not for the expence of building a new ship, *H. 68*, because the ne- cessity is not so urgent: owners of ships have an hypothec on the cargo, for the freight, *Hume, Dec. 1683, Mure*: heritors on the fruits of the ground, and land-lords on the *investa et illata*, for their rents. (2. 6. 26.) Writers also and agents have a right of hypothec, or more properly of retention, in their constitut- ent's writings, for their claim of pains and dis- bursements. A creditor cannot, for his own payment,

Hypothec.

payment, sell the subject impignorated, even after denunciation to the debtor, as he might have done by the *Roman* law, *l. 4. de pign. act.* he must apply to the judge ordinary, for a warrant to put it up to public sale or roup, and to this application the debtor ought to be made a party.

A pledge cannot be sold without a sentence.

TIT. 2 *Of Obligations by Word or Writ.*

There is nothing in the law of *Scotland*, analogous to the *verborum obligatio* of the *Romans*, which was created by the parties uttering certain *verba solennia* or words of style; and therefore the appellation of *verbal* may be properly enough applied by us, to all obligations, to the constitution of which writing is not essential, which includes both real and consensual contracts: but, as these are explained under separate titles, obligations *by word*, in the sense of this rubric, must be restricted to promises, or to such verbal agreements, as have no special name to distinguish them. Agreement implies the intervention of two different parties, who come under mutual obligations to one another. Where nothing is to be given or performed, but on one side, it is properly called a promise, which therefore, being gratuitous, does not require the acceptance of him to whom the promise is made. An offer, which must be distinguished from a promise, implies something to be done by the other party, and consequently is not binding on the offerer,

ferer, till it be accepted, with its limitations or conditions, by him to whom the offer is made; after which, it becomes a proper agreement. The different methods of proof, required for supporting these different obligations, will be explained, 4. 2, 11. and 12.

Writing
must inter-
veen in ob-
ligations
concerning
heritage.

*Locus poe-
nitentiae.*

When ex-
cluded.

Writing is
unnecessa-
ry in pa-
tis libera-
toris.

2. Writing must necessarily intervene in all obligations and bargains concerning heritable subjects, tho' they should be only temporary; as tacks, which, when they are verbal, last but for one year. In these, no verbal agreement is binding, tho' it be referred to the oath of the party; for, till writing is adhibited, law gives both parties a right to refile, as from an unfinished bargain; which is called *locus poenitentiae*. Yet such writing need not be executed in the form of a contract: a written offer to sell, signed by one of the parties, when it is delivered to, and verbally accepted by the other, becomes obligatory on the offerer; tho' there should be no written acceptance, or other obligation signed by the party to whom the offer is made, 23. Nov. 1748, Lord *Kilkerran*. If, upon a verbal bargain of lands, part of the price shall be paid by him who was to purchase, the *interventus rei* creates a valid obligation; and gives a beginning to the contract of sale, F. 23. Dec. 1697, *Laury*; and in general, where-ever matters are no longer intire, the right to refile seems to be excluded. An agreement, whereby a real right is passed from or restricted, called *pactum liberatorium*, may be perfected verbally, 8. Feb. 1666, *Ker*; for freedom is favourable, and the purpose of such agreement is rather to dissolve than to create an obligation. Writing is also essential to bargains

gains made under condition that they shall be reduced into writing; for in such cases, it is *pars contractus*, that, till writing be adhibited, both parties shall have liberty to withdraw, 12. Jan. 1676, *Campbell*: writing is also required in testaments, but verbal legacies are sustained, where they do not exceed 100 L. *Scots*, (3. 9. 2.)

3. Antiently, when writing was little used, deeds were executed by the party appending his seal to them; but even then, witnesses behoved to be present at the sealing, as appears by our oldest writings yet extant; see *R. M. l.*

2. c. 38, §. 1.—*Cr.* 186. §. 17. For preventing frauds, that might happen by appending seals to false deeds, the subscription also of the grantor was required by 1540, c. 117; and, if he could not write, that of a notary: but this act not having expressly required the subscription of the witnesses, it was thought sufficient, that their names were inserted in the body of the deed. As it was dangerous to give full force to the subscription of the parties by initials (the first letters of the name and surname) which is more easily counterfeited; our practice, in order to sustain such subscription, seems to require a proof, not only that the grantor used to subscribe in that way, but that *de facto* he had subscribed the deed quarrelled, 21. June 1681, *Couts*; at least, if the instrumentary witnesses be still alive, *Halk.* (subscription) Nov. 1683, *Galloway*,—July 1729, *Thomson*.

4. As a further check, it is provided by 1579, c. 80, that all writings carrying an heritable right, and other deeds of importance, be subscribed

Solemnities of written obligations.

Subscription by the party before witnesses, or by a notary for him.

scribed by the principal parties, if they can subscribe ; otherwise, by two notaries, before four witnesses specially designed. The subsequent practice extended this requisite of the designation of the witnesses, according to the plain purview of the statute, to the case where the parties themselves subscribed : but, at the same time, where the witnesses were named in a deed, but not designed, the party founding on the deed was, by the indulgence of our judges, allowed to condescend on the designations; which condescendance was to be ascribed, either by the witnesses themselves, or *ex comparatione literarum*, where they were deceased, and had also subscribed as witnesses : and this obtained with respect to all deeds granted after this statute, till act 1681, c. 5, which declared the omission of the designations not suppliable by any after condescendance, 28 July 1753, *Urquhart*. Custom has construed obligations for sums exceeding 100 *L. Scots* to be obligations of importance, which is probably founded on *Act. S. 8. June 1597*, establishing that sum as the standard, beyond which payments were not allowed to be proved by witnesses. In a divisible obligation, tho' exceeding 100 *L.* the subscription of one notary is sufficient, if the creditor restricts his claim to 100 *L.* : but, where the obligation is indivisible, *e. g.* for the prestation of a fact, if it is not subscribed in terms of the statute, it is utterly void. When notaries thus attest a deed, the attestation or docquet must specially express, that the granter gave them a mandate to sign ; nor is it sufficient that this be mentioned

The omission to design witnesses not now suppliable.

oned in the body of the deed, 18. *June* 1745, *Birrel*.

5. In every deed, the name of him who writes it, with his dwelling place or other mark of distinction, must be inserted, 1593, c. 175. The witnesses must, by the foresaid act 1681, both subscribe as witnesses, and their names and designations be inserted in the body of the deed; and all subscribing witnesses must know the granter, and either see him subscribe or hear him acknowledge his subscription, otherwise they are declared punishable as accessory to forgery. Where a disposition, decreet or other security, is to consist of several sheets of paper, it may be written by way of book, in place of the former custom of pasting together the several sheets, and signing the joinings on the margin; provided each page be signed by the granter, and the testing clause express how many pages the deed contains, 1696, c. 15.

The writer's name must be inserted.

Deeds may be written bookways.

6. Instruments of seisin are valid, if subscribed by one notary, before a reasonable number of witnesses, *Aug.* 1584, c. 4, which is extended by practice to instruments of resignation. Two witnesses are deemed a reasonable number to every deed that can be executed by one notary, 15. *July* 1680, Bishop of *Aberdeen*. In instruments of seisin, resignation and intimation, the witnesses must subscribe, and their names and designations be inserted in the instrument, 1681, c. 5. Seisins are allowed, by 1686, c. 17, to be written bookways, provided the notary signs each page, and narrates, in his attestation, how many leaves the seisin consists of; but, as notaries have generally neglected

Solemnities of notarial instruments.

Of execu-
tions.

ed to condescend on the number of leaves, the the objection founded on this omission was repelled, *Mill.* 2. Executions by messengers and other officers of the law were, by our antient statutes, valid, barely by affixing their stamp or signet, without subscription, 1540, *c.* 74. The subscription of the officer came to be required, by 1592, *c.* 139; and, at last, by 1686, *c.* 4, the subscription also of witnesses is made necessary, and the necessity of stamping taken off. The before quoted act 1681, requires likewise the designation of the witnesses in certain sorts of executions, *viz.* inhibition, interdiction, horning and arrestment: executions therefore of summonses fall not under this act, 8. *Dec.* 1736, *Napier*; for the enumeration of some particulars implies the exclusion of all others. It is not necessary that the witnesses to a notorial instrument or execution see the notary or messenger subscribe; for they are called as witnesses to the transaction which is attested, and not to the subscription of the person attesting, see 5. *July* 1710, *Lord Gray*.

Deeds
must be
written on
stamped
paper.

7 A new requisite has been added to certain deeds since the union, for the benefit of the revenue: they must be executed on stamped paper or parchment paying a certain duty to the crown. Charters, resignations, feilins and retours are charged with 2 *s.* 3. *d.* of duty, 10mo *An.* *c.* 19: bonds, tacks, contracts and other personal obligations, with 6 *d.* 12mo *An. stat.* 2. *c.* 9. §. 21. Bail bonds are specially excepted from the statute: neither do bills, testaments, discharges of rent or of annualrent; nor any judicial deeds, as notorial instruments, bonds

bonds of cautionry in suspensions, &c. fall under it.

8. The inserting of the time and place of subscribing, being a strong guard against forgery, is considered by Visc. *Stair* p. 690, as essential to all deeds; but the contrary has been found by two judgments, 15. *Feb. 1706, Duncan*, — 21. *July 1711, Ogilvy*. The granter's name and designation are essential, not properly as solemnities, but because no writing can have effect without them. Bonds were, by our ancient practice, frequently executed without filling up the creditor's name; and they passed from hand to hand, like notes payable to the bearer: but, as there was no method for the creditor of a person possessed of these, to secure them for his payment, all writings blank in the creditor's name were discharged, as covers to fraud, with the exception of indorsations of bills of exchange, 1696, c. 25.

Is the mention of the date or place necessary?

Blank bonds.

9. Certain privileged writings do not require the ordinary solemnities. 1. Holograph deeds (written by the granter himself) are effectual without witnesses. A deed is holograph, where the substantials of it are written by the granter, 23. *Jan. 1675, Vanse*. The date of no holograph writing, except a bill of exchange, (see below, next §.) can be proved by the granter's own assertion, in prejudice either of his heir or his creditors, but must be ascribed by other adminicles, 21. *June 1665, Braidy*. 2. Testaments, if executed where men of skill in business cannot be had, are valid, tho' they should not be quite formal, *F. 1. Jan. 1708, Ker*: and, let the subject of a testament be ever so valuable, one notary signing

Privileged deeds.

Holograph writings.

Testaments.

ing for the testator, before two witnesses is in practice sufficient. Clergymen were frequently notaries before the reformation; and, tho' they are, by 1584, c. 133, discharged to act as notaries, the case of testaments is excepted, so that these are supported by the attestation of one minister with two witnesses. 3. Discharges to tenants are sustained without witnesses, from their presumed rusticity or ignorance in business, 7. Nov. 1674, *Boyd*. 4. Missive letters *in remercatoria*, commissions and fitted accounts in the course of trade, and bills of exchange, tho' they are not holograph, are, from the favour of commerce, sustained without the ordinary solemnities.

Discharges to tenants.

Merchants accounts or letters.

Bills of exchange.

10. A bill of exchange is an obligation in the form of a mandate, whereby the drawer or mandant desires him to whom it is directed, to pay a certain sum at the day and place therein mentioned, to a third party. Bills of exchange are drawn by a person in one country to his correspondent in another; and they have that name, because it is the exchange, or the value of money in one place compared with its value in another, that generally determines the precise extent of the sum contained in the draught. The creditor in the bill is sometimes called the possessor or *porteur*. As parties to bills are of different countries, questions concerning them ought to be determined by the received custom of trading nations, unless where special statute interposes. For this reason, bills of exchange, tho' their form admits not of witnesses, yet prove their own dates, in questions, either with the heir or creditors of the debtor: but, if this doctrine should be extended

Prove their own dates.

tended to the case of such inland bills as are made payable to the drawer himself, and where consequently the only persons concerned are the drawer and acceptor; heirs might be cut out of the plea of death-bed, and creditors out of the benefit of inhibition, see *Macdoul v. 1.* p. 364.

11. A bill is valid, without the designation either of the drawer or of the person to whom it is made payable: it is enough that the drawer's subscription appears to be truly his; and one's being possessor of a bill, marks him out to be the creditor, if he bears the name given in the bill to the creditor: nay, tho' the person drawn on should not be designed, his acceptance presumes, that it was he whom the drawer had in his eye, *H. 96.* Bills drawn blank, in the creditor's name, fall under the statute 1696; for, tho' indorsations of bills are excepted from it, bills themselves are not. Not only the person drawn upon, must sign his acceptance, but the drawer must sign his draught, before any obligation can be formed against the acceptor; bills being really mandates: yet it is sufficient in practice, that the drawer signs, before the bill be produced in judgment; tho' it should be after the death, both of the creditor and acceptor, *F. v. 2.*

15. A creditor in a bill may transmit it to another by indorsation, tho' the bill should not on bear to his order; by the same rule that other rights are transmissible by assignation, tho' they do not bear to assignees, *H. 78.*

12. The drawer, by signing his draught, becomes liable for the value to the creditor in the bill, in case the person drawn upon, either

ther does not accept, or, after acceptance, does not pay; for he is presumed to have received value from the creditor at giving him the draught, tho' it should not bear *for value received*: but, if the drawer was debtor to the creditor in the bill before the draught, the bill is presumed to be given towards payment of the debt, unless it expressly bears *for value*, 18. *July 1712, Cheap.* The person drawn upon, if he refuses to accept, while he has the drawer's money in his hands, is liable to him in damages. As a bill presumes value from the creditor, indorsation presumes value from the indorsee; who therefore, if he cannot operate payment from the acceptor, has recourse against the indorser, unless the bill be indorsed in these words, *without recourse*.

On the
person
drawn up-
on.

Effects of
payment
by the ac-
ceptor.

13. Payment of a bill, by the acceptor, exonerates both the drawer and him at the hands of the creditor; but it intitles the acceptor, if he was not the drawer's debtor, to an action of recourse against him; and, if he was, to a ground of compensation. Where the bill does not bear value in the hands of the person drawn upon, it is presumed that he is not the drawer's debtor; and consequently, he has recourse against the drawer *ex mandato*, see 10. *July 1712, Wilson.*

Bills are
considered
as cash.

14. Bills, when indorsed, are considered as so many bags of money delivered to the onerous indorsee; which therefore carry right to the contents, free of all burdens that do not appear on the bills themselves. Hence, a receipt or discharge, by the original creditor, if granted on a separate paper, does not exempt the acceptor from second payment to the indorsee;

indorsee : hence also, no ground of compensation, competent to the acceptor against the original creditor, can be pleaded against the indorsee ; but, if the debtor shall prove by the oath of the indorsee, that he paid no value for the indorsation, the indorsee is justly considered as but a name, and therefore all exceptions, receivable against the original creditor, will be sustained against him. 15. Jan. 1708, *Craufurd*.

15. Bills must be negotiated by the possessor, against the person drawn upon, within a precise time, in order to preserve recourse against the drawer. Where a bill is payable so many days after sight, the possessor must, without delay, present it for acceptance, and, in case of refusal, protest ; because the least delay, in presenting such bill, prolongs the term of payment in prejudice of the drawer : but bills payable on a day certain, need not be presented for acceptance till the day of payment, because that day can neither be prolonged nor shortened by the time of acceptance, *H. 93.—F. v. 2. 75.* For the same reason, the acceptance of bills payable on a precise day need not be dated ; but, where a bill is drawn payable on sight, or so many days after sight, it must, because there the term of payment depends on the date of the acceptance.

Negotiation or diligence required in the creditor.

16. Tho' bills are, in strict law, due the very day on which they are made payable, and may therefore be protested on the day thereafter ; yet there are three days immediately following the day of payment, called days of grace, within any of which, the creditor may protest the bill : but, if he delay protesting till

Days of grace.

till the day after the last day of grace, he loses his recourse, 29. Jan. 1751, *Cruikshanks*. Where a bill is protested, either for not acceptance or not payment, the dishonour must be notified to the drawer or indorser, within three posts at furthest. This strictness of negotiation is confined to such bills as may be protested by the possessor immediately after the days of grace: where bills are indorsed after these are expired, the indorsee is left more at liberty, and does not lose his recourse, tho' he should not take a formal protest for not payment, if within a reasonable time he shall give the indorser notice of the acceptor's refusing to pay, *F. v. 2. 76*. Not only does the possessor, who neglects strict negotiation, lose his recourse against the drawer, where the person drawn upon becomes afterwards bankrupt, but, tho' he should continue solvent; for he may in that case recover payment directly from the debtor, and so is not to be indulged in an unnecessary process against the drawer, which he has tacitly renounced by his negligence, *Nov. 1744. Littlejohn*. Recourse is preserved against the drawer, tho' the bill should not be duly negotiated, if the person drawn upon was not debtor to the drawer; for there the drawer can qualify no prejudice by the omission, and he ought not to have drawn on one who owed him nothing.

Bills indorsed after the term of payment.

When does the creditor lose recourse against the drawer?

Privileges of bills by statute.

17. The privileges superadded to bills by statute are, that tho', by their form, they can have no clause of registration, yet if duly protested, they are registrable within six months after their date in case of not acceptance, or in six months after the term of payment in the case of not payment; which registration is made

made the foundation of summary diligence; either against the drawer, in the case of not acceptance, or against the acceptor, in case of not payment, 1681, c. 20. This statute is extended, by 1696, c. 36, to inland bills, *i. e.* bills both drawn and made payable in Scotland. ^{Inland bills or precepts} After acceptance, summary diligence lies against no other than the acceptor; the drawer and indorser must be pursued in the recourse by an ordinary action. It is only the principal sum in the bill, and interest, that can be charged for summarily: the exchange, when it is not included in the draught, the re-exchange incurred by suffering the bill to be protested and returned, and the expence of diligence, must all be recovered by an ordinary action; because these are not liquid debts, and so must be previously constituted.

18. Bills, when drawn payable at any considerable distance of time after date, are denied the privileges of bills; for bills are intended for currency, and not to lie as a security in the creditor's hands, see *H. 55. ad fin.* Donations constituted in the form of a bill, are not even probative, 3. Dec. 1736; *Wier*; nor bills which bear a penalty, see *H. 99*, such a clause being inconsistent with the nature of bills. Our practice is not quite fixed, as to the validity of bills bearing annual rent from the date; compare *F. v. 2. 157.* with 170. Inland precepts drawn, not for money the medium of trade, but for fungibles, were, by the former practice, admitted as probative, tho' without the privilege of bills, *Br. 82*: but, by later decisions, they have been found null, as wanting writer's name and witnesses. Promissory

Certain bills are not privileged.

missory notes without the ordinary solemnities are also null, if they are not holograph, 29. Jan. 1708, *Arbutnot*.

Solemnities of deeds signed in a foreign country.

19. As for the solemnities essential to deeds signed in a foreign country, when they come to receive execution in *Scotland*, it is a general rule, that no laws can be of authority without the dominions of the lawgiver. Hence, in strictness, no deed, tho' perfected according to the law of the place where it is signed, can have effect in another country where different solemnities are required to a deed of that sort. But this rigour is so softened *ex comitate*, by the common consent of nations, that all personal obligations, signed according to the *lex loci*, have validity every-where, *H. 23*: which obtains even in obligations to convey heritage, 5. July 1706, *Cunningham*. Conveyances themselves, if they are of heritable subjects, must be perfected according to the law of the country where the heritage lies, and from which it cannot be removed, *Feb. 1729, E. Dalkeith*: but a conveyance of moveables, which have no fixed seat, and are therefore said to follow the owner, if it is perfected according to the *lex loci*, will receive execution in *Scotland*, 16. July 1636, *Sinclair*,—*D. 390*.

Delivery.

And deposition of deeds.

20. A writing, while the granter keeps it under his own power or his doer's, has no force; it becomes obligatory, only after it is delivered for the use of the grantee, or deposited in the hands of a third person to be delivered to the grantee in a certain event. A deed found in the hands of one, who is doer both for the granter and grantee, is from the favour of delivery, presumed to have been put in his

his hands as doer for the grantee, 1735, *Seton*. The presumption is also for delivery, if the deed appears in the hands of one who is a stranger to both, see *St.* 687. Where a deed is deposited in the hands of a third person, the terms of deposition may be proved by the oath of the depositary, 5. *March* 1624, *Hay*, unless where they are reduced into writing, 24. *Feb.* 1675, *Cowan*. A deed in the hands of the grantee himself, is considered as his absolute right, in so much that the granter is not allowed to prove that it was granted in trust, otherways than by a written declaration signed by the trustee, or by his oath, 1696, *c.* 25.

21. The following deeds are effectual without delivery. 1. Writings containing a clause dispensing with the delivery: these are of the nature of revokable deeds, where the death of the granter is equivalent to delivery, because after death there can be no revocation. 2. Rights to children; for parents are the proper custodians of their children's writings, 29. *June* 1624, *Silverton-bill*,—25. *Feb.* 1663, *Aikenhead*. From a similar reason, postnuptial settlements granted by the husband to the wife need no delivery, *Br.* 78.—3. Rights in which the granter reserves an interest to himself; for it is presumed he holds the custody of these, merely to secure to himself such reserved interest, 19. *June* 1668, *Hadden*. 4. Rights that the granter lay under an antecedent natural obligation to execute, *e. g.* rights granted to a cautioner for operating his relief, 18. *Jan.* 1677, *Dick*. 5. Mutual obligations, *e. g.* contracts; for every such deed, the moment it is executed, is a common evi-

What
deeds are
effectual
without
delivery.

dent to both the parties contracters. Lastly, the publication of a writing by registration is equivalent to delivery, *D. 272.*

TIT. 3. Of Obligations and Contracts arising from Consent, and of accessory Obligations.

Consensual contracts.

CONTRACTS consensual, *i. e.* which might, by the *Roman* law, be perfected by sole consent, without the intervention, either of things or of writing, are sale, permutation, location, society and mandate. Where the subject of any of these contracts is heritable, writing is necessary.

Sale.

2. Sale is a contract by which one is obliged to give something to another, in consideration of a certain price in current money to be paid for it. *Arrhae* or earnest is sometimes given by the buyer, as an evidence that the contract is perfected; but this is not necessary. Earnest was computed in the price, by the *Roman* law; but what is given here-under that name is generally so inconsiderable, that it is *dead* earnest, *i. e.* not reckoned in the price. Things consisting merely in hope may be the subject of this contract, as the draught of a net, or the hope of succession. (*infr. §. 34.*) Commodities, where their importation or use is absolutely prohibited, cannot be the subject of sale; but, where the importation is only burdened with a duty, law allows their use, and consequently leaves them as a subject of commerce, *H. 40.* The price in current money may

may be fixed, either, 1. by the agreement of parties at making the contract; in which case, let it be ever so disproportioned to the value of the subject, the sale is valid by our law, 23. *June 1669, Fairy*, tho' it was otherways by the *Roman*, l. 2. *C. de rescind. vend.* Or, 2. by a reference, either to a third person, or even to one of the contracters themselves, 13. *March 1639, E. Montrose.*

3. Tho' this contract may be perfected before delivery of the subject, the property remains till then with the vendor. (2. 1. 10.) Notwithstanding which, if the subject perished, it perished, by the *Roman* law, to the buyer, §. 3. *inst. de empt. et vend.* contrary to the rule, *res perit domino*; because the property in the vendor was considered to be but nominal, he being obliged to transfer it to the buyer. Lord *Stair* doubts whether this would hold in our practice, p. 128: but it is an agreed point, that the hazard of the deterioration of the subject falls on the purchaser, because he has all the profits arising from it after the sale. On the other hand, it is certain, that the subject itself perishes to the vendor. 1. If it should perish through his fault, or after his undue delay to deliver it, d. §. 3. 2. If a subject is sold as a fungible, and not as an individual or *corpus*, l. 35. §. 5. *de contr. empt.* e. g. a quantity of farm wheat, sold without distinguishing the parcel to be delivered from the rest of the farm. 3. The *periculum* lies on the seller till delivery, if he is obliged by the contract to deliver the subject at a certain place, *F. 25. Jan. 1687, Spence.*

4, The

Emption
a non do-
mino.

Warran-
dice.

Actio red-
dibitoria.

Passum de
retroven-
dendo.

Permuta-
tion.

Location.

4. The vendor, where he is not the true owner, cannot, by delivery, transfer to the purchaser that property which was not his to give; but the purchaser, in respect of his *bona fides*, makes the fruits of the subject his own, till it be evicted or at least reclaimed by the true owner; (2. 1. 13.) and as warrandice is implied in all sales, the vendor must make the subject good, if it be evicted, (2. 3. 11.) The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying, had he known it, and if he quarrells it recently, founds him in an action (*actio reddibitoria*) for annulling the contract. If the defect was not essential, he was, by the *Roman* law, intitled to a proportional abatement of the price, by the action *quantum minoris*: but as our practice does not allow sales to be reduced, on account of the disproportion of the price to the value of the subject, it is probable that it would also reject the action *quantum minoris*. A seller who covenants to himself, by a *passum de retrovendendo*, a right to redeem the subject within a certain time, cannot, after that time, purge his delay by offering the redemption money, as a reverser in a wadset might do before declarator; for in sales, an adequate price is presumed to be given to the seller, and so there is nothing penal in the irritancy. (2. 8. 5.) Permutation differs from a sale chiefly in this, that in permutation, one subject is to be given in barter or exchange for another, whereas the price in a sale consists of current money.

5. Location is that contract, where an hire is stipulated for the use of things, or the service

vice of persons. It may, without impropriety, be considered as a species of sale, in which the subject sold is the use or service, and the price is the hire, which must consist, as in a proper sale, of money. He who lets his work or the use of his property to hire, is the locator or lessor, and the other, the conductor or lessee. In the location of things, the lessor is obliged to deliver the subject, fitted to the use it was let for; and the lessee must preserve it carefully, put it to no other use, and, after that is over, restore it. Where a workman or artificer lets his labour, if the work is either not performed according to contract, or, if it is insufficient, even from mere unskillfulness, he is liable to his employer in damages, *l. 9. §. 5. locat.* for he ought not to have undertaken a work to which he was not equal. A servant, hired for a certain term, is intitled to his full wages, tho' from sickness or other accident he should be disabled for a part of his time; but, if he dies during his service, his wages are only due for the time he actually served. If the master dies, or without good reason turns off his servant before the term, the servant is intitled to his full wages and to his maintenance till that term; and, on the other hand, a servant, who, without ground, deserts his service, forfeits his wages and maintenance, and is liable to his master in damages. The doctrine of location of lands is already explained, *2. 6. 8. et seq.*

Obligations on the lessor.

On the lessee.

6. Society or copartnership is a contract, whereby the several partners agree concerning the communication of loss and gain arising from the subject of the contract. It is formed

Society,

*Societas le-
anina.*

ed by the reciprocal choice that the partners make of one another; and so is not constituted in the case of co-heirs or of several legatees in the same subject. A copartnery may be so constituted, that one of the partners shall, either from his sole right of property in the subject, or from his superior skill, be intitled to a certain share of the profits, without being subjected to any part of the loss: but a society, where one partner is to bear a certain proportion of loss, without being intitled to any share of the profits, is justly reprobated. All the partners are intitled to shares of profit and loss proportioned to their several stocks, where it is not otherways covenanted.

*Obligati-
ons on the
socii.*

7. As partners are united from a *delectus personae* in a kind of brotherhood, no partner can, without a special power contained in the contract, transfer any part of his share to another. Where therefore a third person is assumed by a partner, such assumption forms a separate contract betwixt the assumer and the assumed, limited to the share of the partner assuming, and in which the others have no concern. Upon the same principle, all benefit stipulated by one of the partners to himself, in a matter that naturally falls under the copartnery, accrues to the whole, 26. *March* 1624, *Inglis*: and no partner is accountable for an error in management, arising from the want of a larger share of prudence or skill than he was truly master of.

8. All the partners are bound *in solidum* by the obligation of any one of them, if he subscribes by the *firm* or social name of the company; unless it be a deed that falls not under the

the common course of administration, as if a partner should take upon him to submit a company claim to an arbiter, *Nov. 1728, Lumsdaine*. A partner is obliged to advance the sums necessary for carrying on the copartnery, according to his share in it; and he is intitled to the reimbursement of the sums he has expended, or the losses he has sustained on the company's account, out of the common stock; and if that falls short, the other partners are liable *in solidum* to make up the loss, he bearing his own proportion thereof. The company effects are the common property of the society, subjected to its debts; so that no partner can claim a division thereof, even after the society is dissolved, till these are paid; and, consequently, no creditor of a partner can, by diligence, carry to himself the property of any part of the common stock, in prejudice of a company creditor: but he may, by arrestment, secure his debtor's share in the company's hands, to be made furthcoming to him at the close of the copartnery, after payment of the company debts.

☛ Society, being founded in the mutual confidence among the *socii*, is dissolved, not only by the renunciation, but by the death of one of them, if it be not otherways specially covenanted, *l. 65. §. 9. pro socio*. A partner, who renounces upon unfair views, or at a critical time when his withdrawing may be fatal to the society, looses his partners from all their engagements to him, while he is bound to them for all the profits he shall make by his withdrawing, and for the loss arising thereby to the company, *§. 4. inst. b. t.* Not only natural

Is it dissolved e-
gestate?

tural, but civil death, e. g. by the sentence of a judge inflicting capital punishment, makes one incapable to perform the duties of a partner, and consequently dissolves the society. In both cases, of death and renunciation, the remaining partners may continue the copartnery, either expressly, by entering into a new contract, or tacitly, by carrying on their trade as formerly. Tho' this contract was dissolved, by the *Roman law*, *egestate*, by the bankruptcy of any of the partners, l. 4. §. 1. *pro soc.* 3 yet, if after goods are bought on the company's credit, one of the partners should fail, the rest cannot pocket up the whole profits, on pretence that they run the whole risk, 12. July 1749, *Paterson*. Public trading companies are now every day constituted, with rules very different from those which obtained in the *Roman law*, or yet obtain in private societies. The proprietors or partners, tho' they may transfer their shares, cannot renounce; nor does their death dissolve the company, but the share of the deceased descends to his heir.

A joint trade differs from a copartnery.

10. A joint trade is not a copartnership, but a momentary contract, where two or more persons agree to contribute a sum, to be employed in a particular course of trade, the produce whereof is to be divided among the adventurers according to their several shares, after the voyage is finished. If in a joint trade, that partner who is intrusted with the money for purchasing the goods, should, in place of paying them in cash, buy them upon credit, the furnisher, who followed his faith alone in the sale, has no recourse against the other adventurers; he can only recover from them what

what of the buyer's share is yet in their hands. Where any one of the adventurers, in a joint trade, becomes bankrupt, the others are preferable to his creditors upon the common stock, as long as it continues undivided, for their relief of all the engagements entered into by them on account of the adventure, 11. Jan. 1740, creditors of *Macaul*.

11. Mandate is a contract, by which one Mandate. employs another to manage any business for him ; and, by the *Roman* law, it behoved to be gratuitous. It may be constituted tacitly, by one's suffering another to act in a certain branch of his business, for a tract of time together, without challenge. The mandatary is at liberty not to accept of the mandate ; and, as his powers are solely founded in the mandant's commission, he must, if he undertakes it, strictly adhere to the directions given him : nor is it a good defence, that the method he followed was more rational ; for in that his employer was the proper judge. Where no special rules are prescribed, the mandatary, if he acts prudently, is secure, whatever the success may be ; and he is intitled to a repetition of all the expences reasonably disbursed by him in the execution of his office. Obligations on the mandata-ry.

12. Mandates may be general, containing a power of administering the mandant's whole affairs ; but no mandate, however ample, can be construed into an order to commit a crime, which, being itself criminal, cannot be inferred by implication. Neither does any mandate imply a power of disposing gratuitously of the constituent's property ; nor even of selling his heritage for an adequate price : but a

general mandatary may sell such of the mandant's moveables as must otherways perish (*quae servando servari nequeunt.*) No mandatary can, without a special power, transact doubtful claims belonging to his constituent, or refer them to arbiters.

How
mandates
expire.

13. Mandates expire, 1. By the revocation of the employer, not only express but tacit, as if he should name another mandatary for the same business. 2. By the renunciation of the mandatary, even after he has executed part of his commission, if his office be gratuitous. 3. By the death, either of the mandant or mandatary; for one is presumed to give, and the other to accept the mandate, from personal regards of confidence and friendship: but, if matters are not intire, the mandate continues in force, notwithstanding such revocation, renunciation or death. Procuratories of resignation and precepts of seisin are made out in the form of mandates; but, because they are granted for the sole benefit of the mandatary, they are declared not to expire, either by the death of the granter or grantee, 1693, c. 35.

Tacit
mandate.

14. The favour of commerce has introduced a tacit mandate, by which masters of ships are impowered to contract, in name of their exercitors or employers, for repairs, ship provisions and whatever else may be necessary for performing the voyage; so as to oblige, not themselves only, but their employers, l. 1. §.

Exercitors
are bound
by the
contract
of the ma-
ster of the
ship.

17. *de exerc. act.* An exercitor is he who employs a ship in trade, whether he is the owner, or only freights her from the owner. Whoever has the actual charge of the ship is deemed the master, tho' he should have no express commission

commission from the exercitors, or should be substituted by the master in the direction of the ship, without their knowledge, l. 1. §. 5. *ibid.* Exercitors are liable upon this contract, whether the master has been furnished in necessities directly by a merchant, or has borrowed money from another to purchase them. The furnisher or lender must prove that the ship needed reparations, provisions, &c. to such an extent; but they are not obliged to prove the actual application of the money or materials to the ship's use. If there are several exercitors, they are liable, *singuli in solidum*. In the same manner, the undertaker of any branch of trade, manufacture or other land negotiation, is bound by the contracts of the institors whom he employs over it, in so far as relates to the subject of the *praepositura*: and, tho' the institors be pupils, and, consequently, cannot bind themselves, the prepositor, who, knowing their state, gave them a power to contract for him, stands obliged by their deeds, l. 7. §. 2. *de inst. act.*

15. Contracts and obligations, in themselves imperfect, receive strength by the contracter or his heirs their doing any after deed which implies an approbation of them, and consequently supplies the want of an original legal consent. This is called homologation, and it takes place, even in deeds intrinsically null, whether the nullity arises from the want of statutory solemnities, F. 23. Nov. 1699, *Grier-son*, or from the incapacity of the granter, 28. June 1671, *Hume*. It cannot be inferred, 1. In what By the deed of a person who was not in the knowledge of the original right; for one can not approve what he is ignorant of: hence,

one

one's subscribing as witness to a deed, does not infer homologation; for witnesses are only called to attest the subscription, without being told the contents: but a brother's signing as witness to his sister's marriage contract, presumes his knowledge and homologation of the articles, from his near relation to the bride, 15. July 1714, *Davidson*. And yet, an heir's witnessing a deed granted by his predecessor *in lēto*, does not infer homologation, let the relation be never so near, because of the authority which the predecessor is presumed to have over the heir, F. 13. Jan 1704, *Dallas*. 2. Homologation has no place, where the deed which is pleaded as such, can be ascribed to any other cause; for an intention to oblige one's self is not presumed; hence, charters or precepts granted by superiours in obedience to a charge, infer no homologation. Marriage contracts, without witnesses, have been found homologated by subsequent marriage; but, in truth, marriage, which is entered into frequently without any previous written contract, can in no view be deemed an approbation of special marriage articles.

Quasi contracts.

16. Quasi contracts are formed without explicit consent, by one of the parties doing something, that by its nature either obliges him to the other party, or the other party to him. In this class may be reckoned tutory, (1. 7. 12. &c.) the entry of an heir, (3. 8. 26. &c.) *negotiorum gestio*, *indebiti solutio*, communion of goods, and *mercium jactus levandae navis causa*. *Negotiorum gestio* forms that obligation which one comes under by managing the affairs of another in his absence, without a mandate.

date. As he acts without authority from the proprietor, he ought to be liable in exact diligence, *l. 24. C. de usur.* unless he has, from friendship, interposed in affairs which admitted no delay, *l. 3. §. 9. de neg. gest.*; and he is accountable for his intromissions, with interest. On the other hand, he is intitled to the repetition of his necessary disbursements on the subject, tho', by misfortune, it should have perished afterwards, *l. 10. §. 1. de neg. gest.* together with relief from the obligations in which he may have bound himself in consequence of the management.

17 *Indebiti solutio*, or the payment to one of *Indebiti solutio* what is not due to him, if made through any mistake, either of fact, or even of law, 26. July 1733, *Stirling*, founds him who made the payment, in an action of repetition against the receiver, (*condictio indebiti*.) This action does not lie, 1. If the sum paid was due *ex aequitate*, or by a natural obligation; for the right to repeat is founded solely in equity. 2. If he who made the payment knew that nothing was due; for *is qui consulto dat quod non debebat, praesumitur donare*. Some lawyers add a third case, *viz.* if the sum was paid in consequence of a transaction; but, where a sum is so paid, there is no *indebitum*; the transaction itself creates a debt, tho' there had been no prior debt existing.

18. Where two or more persons become common proprietors of the same subject, either by legacy, gift or purchase, without the view of copartnership; an obligation is thereby created among the proprietors, to communicate the profit and loss arising from the subject, Right of dividing common property.

ject, while it remains common : and the subject might, by the *Roman* law, be divided at the suit of any one of them, by the action *communi dividundo*. No such action, in relation to lands, was competent by our law, till 1695, c. 38, which authorized the division of commonities before the court of Session, at the suit of any having interest. This division, where the question is among the common proprietors, is to be governed by the last clause in the statute, *according to the valuation of their respective properties*: but, where the question turned between the proprietors and these that had servitudes upon the property, the rule mentioned in a preceeding clause of the act took place, by the former practice, *according to the value of the interests of the several persons concerned*: hence, proprietors were allowed a *praecipuum* for their right of property, over and above the share on account of their own, or their tenants possession by pasturage, *H.* 42; but now the superficies is only divided, without prejudice to the property; see below next §.

What is understood to be commonity.

19. It has been doubted, what is to be understood by *commonity*: the word, in proper speech, supposes two common proprietors at least; and yet in our law language and in charters, it frequently signifies a heath or muir, tho' it should belong in property to one, if there is a promiscuous possession upon it by pasturage; and the act 1695 excepts commonities belonging in property to the King, or to royal borrows. The question therefore, whether action lies upon this statute, where there is but one proprietor, at the suit of these who have

have servitudes upon it, has been variously decided. By the last judgment, *F. v. 1. 251*, it was found, waving the general point, that in such case, the several servitudes might be limited according to the several interests of the parties in the superficies, without prejudice to the right of property. Another act of the same year, *c. 23*, authorized the division of lands lying runrig, and belonging to different heritors, with the exception of borrow and incorporated acres: the execution of which is committed to the judge ordinary or justices of the peace.

Division
of runrig
lands.

20. The throwing of goods overboard, for lightening a ship in a storm, creates an obligation, by the *Rhodian law*, *de jactu*, adopted by the *Romans* and most trading nations, by which the owners of the ship and goods saved, are obliged to contribute for the relief of these whose goods were cast overboard, that so all may bear a proportional loss of the goods ejected for the common safety. In this contribution, the goods ejected are valued at prime cost; and the ship and goods saved, at the price they may give at the next port, *l. 2. §. 4. de leg. Rhod.*; but the ship's provisions suffer no estimation, *l. 2. §. 2. eod. t.* A master, who has cut his mast, or parted with his anchor to save the ship, is intitled to this relief, *l. 3. eod. t.*; but, if he loses them by the storm, the loss falls only on the ship and freight. If the ejection does not save the ship, the goods preserved from shipwreck are not liable in contribution. By the later laws of *Wisby*, *art. 20*, ejection may be lawfully made, if the master and a third part of the mariners judge that measure necessary, tho' the owner of

Lex Rhodia de jactu.

of the goods should oppose it : and the goods ejected are to be valued at the price, that the goods of the same sort which are saved, shall be afterwards sold for.

Accessory obligations.

21. There are certain obligations, which cannot subsist by themselves, but are accessions to, or make a part of other obligations. Of this sort are fidejussion, and the obligation to pay interest. Cautionry or fidejussion is that obligation, by which one becomes ingaged as security for another, that he shall either pay a sum, or perform a deed.

Fidejussion.

A simple cautioner has the benefit of discussion.

22. A cautioner for a sum of money may be bound, either simply as cautioner for the principal debtor, or conjunctly and severally for and with the principal debtor. The first has, both by the *Roman* law and ours, the benefit of *nescium ordinis* or of discussion, by which the creditor is obliged to discuss the proper debtor, before he can insist for payment against the cautioner. By discussing, is not understood a bare demand of the debt : the person of the debtor must be discussed by denunciation and the registration of the horning ; his moveable estate by poynding, or arrestment and furthcoming ; and his heritage by adjudication. Where one is bound as full debtor with and for the principal, or conjunctly and severally with him, the two are bound equally in the same obligation, each to perform the whole of it ; and consequently, the cautioner, tho' he is but an accessory, may be pursued for the whole, without either discussing, or even citing the principal debtor. Cautioners for performance of facts, or for the faithful discharge of an office, *e. g.* for factors, tutors, &c.

Cautioner for performance of facts.

are, by the nature of their obligation, liable only conditionally, in case of non-performance by the principal obligant: the failure against the principal must therefore be previously constituted, and they are intitled to the benefit of discussion, *F. 13. Nov. 1677, Sandilands.*

23. In the case of two or more cautioners, each of them, by the *Roman* law, pronounced the obligatory words by himself, and so became bound to the creditor *in solidum*; until the *beneficium divisionis* was introduced, whereby cautioners were intitled to insist, that the obligation might be divided among all of them *pro rata*; §. 4. *inst. de fidejuf.* By our law, all the co-cautioners are bound in the same writing, so that there is no place for this benefit; for, when they become obliged conjunctly and severally, the plain intention of parties is, that the obligation should not be divided; and, where they are bound simply as cautioners, each co-cautioner is, by the genuin nature of such obligation, without any privilege, liable only for his own proportion.

24. Fidejussion may be interposed to an obligation merely natural, in which the cautioner will continue bound, tho' the principal debtor should get free: thus, a cautioner, in an obligation not legally attested as to the principal, is effectually obliged, because the statutory nullity, on which the principal escapes, does not take away the natural obligation, *F. 2. Feb. 1700; Hepburn*; but since cautionry cannot subsist without some obligation to which it is accessory, the subscription of the cautioner does

*Beneficium
divisionis
among
co-cautioners.*

*Fidejussion
on in an
obligation
merely natural.*

not bind him, where the principal debtor has not signed.

Cautioners have an *actio mandati* against the debtor.

25. The cautioner, who binds himself at the desire of the principal debtor, has an *actio mandati*, or of relief against him, for re-petition of the principal and interest paid by himself to the creditor, and for damages; which action lies *de jure*, tho' the creditor should not assign to him on payment. Under damage, is not comprehended the loss sustained by the cautioner through his own fault, *e. g.* in suspending the debt without good grounds, or in allowing diligence to proceed upon it against his estate. As relief against the debtor is implied in fidejussory obligations, the cautioner, where such relief is cut off, is no longer bound: hence, the defence of prescription saves the cautioner, as well as the principal debtor, *F. 19. Dec. 1695, Doul*; thus likewise, a cautioner is not bound, tho' it should be proved by his oath, that he heard the debtor admit the debt; because, as such oath is not probative against the debtor, the cautioner, if he were bound by it, would pay without relief, *Dalr. 9. Nov. 1699, Herdman*.

In what cases a cautioner has no relief against the debtor.

26. But, 1. Where the cautionry is interposed to an obligation merely natural, the relief is restricted to the sums that have really turned to the debtor's profit. 2. A cautioner, who pays without citing the debtor, loses his relief, in so far as the debtor had a relevant defence against the debt, in whole or in part, *19. Dec. 1632, Maxuel*. Relief is not competent to the cautioner, till he either pays the debt or is distressed for it; except, 1. Where the debtor is expressly bound, to deliver up to the cautioner

tioner his obligation cancelled, against a day certain. 2. Where the debtor is *vergens ad inopiam*; in which case, the cautioner may, by proper diligence, secure the debtor's funds for his own relief, even before payment or distress.

27. Mutual relief was not competent among the cautioners themselves, by the Roman law; for their obligations being separate, and having no mutual connection, payment, made by any one of them to the creditor, extinguished the obligation, unless the cautioner who paid, had got a cession or assignment from the creditor, which he was intitled to demand by the *beneficium cedendarum actionum*: but, by our law, a right of relief is competent *de jure* to the cautioner who pays, against his co-cautioners, without either assignation, or even any clause of mutual relief in the bond; unless where the cautioner appears to have renounced it. Where the principal debtor, in a bond in which a cautioner is bound, grants bond of corroboration with a new cautioner, both cautioners, as they interveen for the same debt, and at the desire of the same debtor, have a mutual relief against each other, *H. 37*: but, where the cautioner in the first bond signs as a principal obligant in the corroboration, the cautioner in the new bond is justly intitled to a total relief against the first cautioner, at whose desire he is presumed to have bound himself, 10. July 1745, *Pollock*. From this mutual relief naturally arising among co-cautioners, it follows, that, if the creditor should discharge one of them, he cannot demand the whole debt from the others, but must deduct that

Mutual relief among co-cautioners.

that part, as to which he has cut off their relief by such discharge.

Judicial
caution-
ry.

Cauti-
oners in a
suspensi-
on.

28. Cautionry is also judicial, as in a suspension. This sort of cautioners got free, if either the charger or suspender died before discussing the suspension, till *Act. S. 29. Jan. 1650*: and even after that act, they were liberated, if the decreet suspended had been turned into a libel, *i. e.* sustained only as a libel through any informality; tho' the suspender should have been in the event decerned in payment. This was altered by *Act. S. 27. Dec. 1709*; but it is sufficient at this day to liberate the cautioner, that, when he became bound, the suspender had good reason to suspend, *e. g.* if the charger had at that period no title, or had not then performed his part, tho' these grounds of suspension should be afterwards taken off. The clerk to the bills, whose duty it is to receive none but solvent cautioners, usually demanded for his security an attestation by one of a known character, of the solvency of the cautioner offered: these attesters must, by the last quoted act of *federunt*, bind themselves as cautioners for the cautioner in the suspension, and so are liable *subsidiariè* in their order, after he is discussed. In all maritime causes, where the parties are frequently foreigners, the defender must find caution *judicio fisci et judicatum solvi*: such cautioner gets free by the death of the defender before sentence, *20. Jan. 1680, Hodge*; but he continues bound, tho' the cause should be carried from the Admiral to the court of Session, *16. Nov. 1636, Stuart*.

Cauti-
oners *judicio*
fisci.

29. It happens frequently, that a creditor takes two or more obligants bound to him, all as principal debtors, without fidejussion. Where they are so bound, for the performance of facts that are in themselves indivisible, they are liable, each for the whole, or *singuli in solidum*, D. 166: but, if the obligation be for a sum of money, they are only liable *pro rata*; unless, 1. Where they are in express words bound conjunctly and severally, or 2. In the case of bills or promissory notes, 13. Nov. 1746, *Eliot*. One of several obligants conjunctly and severally, who pays the whole debt, or fulfills the obligation, is intitled to a proportional relief against the rest, in such manner, that the loss must, in every case, fall equally upon all the solvent obligants.

30. Obligations for sums of money are frequently accompanied with an obligation for the annual rent or interest thereof. Interest (*usurae*) is the profit due, by the debtor of a sum of money, to the creditor, for the use of it. The canon law considered the taking of interest as unlawful, because money yields no natural fruits; but the law of *Moses* allowed it to be exacted from strangers, *Lev. 25. 36.*—*Deut. 23. 19. 20.* and all the nations of *Europe* have found it necessary, after the example of the *Romans*, to authorize it at certain rates fixed by statute. Soon after the reformation, our legal interest was fixed at the rate of 10 per cent. per annum, 1587, c. 52; from which time, it has been gradually reduced, till, at last, by 12mo *An. Stat. 2. c. 16.* it was brought to 5 per cent. and has continued at that rate ever since.

Interest of money.

Rate of interest.

31. Annual rent

Interest
due by
law,

Interest
upon bills,

Upon de-
nunciati-
on.

Upon
sums paid
by cauti-
oners
tressed.

Interest
due by fa-
ctors.

Interest
of the
price of
lands.

31. Annualrent is due either by law or by paction. It is due by law, either from the force of statute, in which may be included acts of *federunt*, or from the nature of the transaction. Bills of exchange, 1681, c. 20, and inland bills, 1696, c. 36, tho' they should not be protested, *H. 15*, carry interest from their date in case of not acceptance, or from the day of their falling due in case of acceptance and not payment. Where a bill is accepted, which bears no term of payment, or which is payable on demand, no interest is due till demand be made of the sum, the legal voucher of which is a notorial protest. By 1621, c. 20, interest is due, by a debtor after denunciation, for all the sums contained in the diligence, even for that part which is made up of interest. Sums, paid by cautioners on distress, carry interest, by *Act. S. 1. Feb. 1610*, (see *Spotsf. Pr. p. 34.*) not only as to the principal sum in the obligation, but as to the interest paid by the cautioner. It was found to be sufficient distress, that the obligation was registred, tho' no charge of horning had been used thereupon against the cautioner, 24. *Jan. 1627, Wauchton*. Factors named by the court of Session on sequestrated estates, are, by *Act. S. 31. July 1690*, made liable in annualrent for the rents under their factory, within a year after they fall due.

32. It arises *ex lege*, or from the nature of the transaction, that a purchaser in a sale is liable in interest for the price of the lands bought, from the term of his entry, tho' the price should be arrested in his hands, 17. *Feb. 1624, Dury*, or tho' the seller should not be able to deliver

deliver to him a sufficient progress or title to the lands, 28. Jan. 1663, L. *Balnagown*; for no purchaser can in equity enjoy the fruits of the lands, while, at the same time, he retains the interest of the price; but, if the purchaser shall make lawful consignation of the price, upon the refusal of the persons having right to receive it, such consignation stops the currency of interest. Where one uplifts money belonging to another which carries interest, he ought to repeat it *cum omni obventionem et causa*, and is therefore liable in the interest of it, as being truly an accessory of the subject itself, 22. Dec. 1710, L. *Drum*,—18. Feb. 1736, *Erskine*. It is also from the nature of the transaction, that the Lords sometimes allow interest to merchants or others in name of damages, or *ex mora*, *Mill.* 42. And the obligation upon tutors, to employ the *nummi pupillares* upon interest after certain periods, (1. 7. 12.) may be derived from the same source.

Interest due to merchants, minors, or others nomine damni.

33. Interest is due by express paction, where there is a clause in a bond or obligation, by which money is made to carry interest. An obligation is not lawful, where the interest of the sum lent, if it should not be paid against a certain day, is accumulated to a principal sum bearing interest; but an obligation may be lawfully granted, not only for the sum truly lent, but for the interest to the day at which the obligation is made payable, 1621, c. 28, whereby the intermediate interest is accumulated into a principal sum, from the term of payment. Interest may be also due by implied By tacit paction: thus, where interest upon a debt is paction. by a letter promised for time past, such promise

mise implies a paction for interest, as long as the debt remains unpaid; thus also, the use of payment of interest presumes a paction, *D.* 408; and, when interest is stipulated for one term, it is presumed to be stipulated till payment, 13. *Jan.* 1669, *Hume.*

General
properties
of obliga-
tion.

Impossible
obligati-
ons.

34. The subject matter of all obligations consists either of things or of facts. Things exempted from commerce cannot be the subject of obligation. (2. 1. 2. *et seq.*) One cannot be obliged to the performance of a fact naturally impossible; nor to an immoral prestation, for that is also, in the judgment of law, impossible, *l.* 15. *de cond. inst.* Bargains, relating to the succession of a person yet alive, were reprobated by the *Roman* law, as *contra bonos mores*, *l.* 61. *de V. O.*; but are allowed by ours, *F.* 29. *July* 1708, *Rag.* Since impossible obligations are null, no penalty or damage can be incurred for non-performance; but it is otherways, if the fact be in itself possible, tho' not in the debtor's power, in which case the rule obtains, *locum facti impræstabilis subit damnum et interesse.*

Obligati-
ons to
which con-
ditions are
adjected
either im-
possible,

Or unfav-
ourable.

35. An obligation, to which a condition is adjected, either naturally or morally impossible, is in the general case null; for the parties are presumed, not to have been serious. But such obligation is valid, and the condition thereof held *pro non scripta*, 1. In testaments. 2. In obligations, to the performance of which, the granter lies under a natural tie, as in bonds of provision to a child. Where an obligation is granted under a condition, lawful but unfavourable, *e. g.* that the creditor shall not marry without the consent of certain friends, no more

more weight is given to the condition than the judge thinks reasonable, whether the obligant lay under a natural tie to oblige himself, *F. 20. July 1688, Pringle*, or not, *Hume, March 1682, Ford*. A condition, which is to be performed by the creditor himself, is held as fulfilled, if he has done all he could to fulfil it, *l. 11. de cond. inst.*; but, where the existence of it does not depend on the creditor, it must actually exist, before the debtor becomes liable. Implement cannot be demanded in a mutual contract, by that party who himself declines, or is not in a capacity to implement the counterpart; thus, a husband becoming bankrupt cannot demand, nor any of his creditors affect the wife's tocher, till her interests stipulated by the marriage articles be secured to her, *5. Dec. 1738, creditors of Watson*.

Potestative conditions.

Implement in contracts must be mutual.

36. Donation is an obligation arising from the mere good will and liberality of the grant-
er. Donations imply no warrandice, but from the future facts of the donor. They are hard-
ly revokable by our law for ingratitude, tho'
it should be of the grossest kind: these betwixt man and wife are revokable by the donor even after the death of the donee; but remuneratory grants, not being truly donations, cannot be so revoked. (*l. 6. 18.*) That special sort which is constituted verbally is called a promise. (*3. 2. 1.*) The Roman law intitled all donors to the *beneficium competentiae*, in virtue of which, they might retain such part of the donation as was necessary for their own subsistence. Our law allows this benefit to fathers, with respect to the provisions granted to their children, *21. Feb. 1745, Buntin*, and

Donation.

When revokable.

Beneficium competentiae.

To whom competent.

to grandfathers, which is a natural consequence of childrens obligation to aliment their indigent parents ; but to no collateral relation, not even to brothers.

Donatio mortis causa.

37. Donations, made in contemplation of death or *mortis causa*, are of the nature of legacies, and like them revokable ; consequently, not being effectual in the granter's life, they cannot compete with any of his creditors, even these whole debts were contracted after the donation. They are understood to be given from a personal regard to the donee, and therefore fall by his predecease. No deed, after delivery, is to be presumed a *donatio mortis causa* ; for revocation is excluded by delivery.

Donation is not presumed in dubio.

38. Deeds are not presumed *in dubio* to be donations. Hence, a deed by a debtor to his creditor, if donation be not expressed, is presumed to be granted in security or satisfaction of the debt ; but bonds of provision to children are, from the presumption of paternal affection, construed to be an additional patrimony : yet a tocher, given to a daughter in her marriage contract, is construed to be in satisfaction of all former bonds, *F. 107*, because marriage contracts usually contain the whole provisions in favour of the bride. One who alimments a person that is come of age, without an express paction for board, is presumed to have intertained him as a friend, unless in the case of these who earn their living by the intertainment or board of strangers, *Br. 106* : but aliment given to minors, who cannot bargain for themselves, is not presumed a donation ; except, 1. Where a presumption arises from

In what cases is aliment presumed a donation.

from the nearness of the relation, that it was given *ex pietate*; or, 2. Where the minor had a father or curators, with whom a bargain might have been made, 21. July 1665, L. Ludquhain, — 11. June 1680, Gordon.

TIT. 4. Of the Dissolution or Extinction of Obligations.

Obligations may be dissolved by implement, consent, compensation, novation or confusion. 1. By specifical implement: thus, an obligation for a sum of money is extinguished by payment. The creditor is not obliged to accept of payment by parts, unless where the sum is payable by different divisions. If a debtor, in two or more separate bonds to the same creditor, had made an indefinite payment, without ascribing it at the time to any one of the obligations; the payment was, by the *Roman* law, to be applied, as the debtor himself would have done, *l. 1. de solut.*; and consequently, to that debt which bore hardest upon him, or to which a penalty was adjected, *l. 3. 4. 5. eod. t.* By our law, which shews a more equal regard to the interests of the creditor and debtor, indefinite payments are applied, first, to annualrents, or to sums not bearing annualrent, *H. 5.* 2. To the sums that are least secured, if the debtor suffers no prejudice, *Jan. 1744, Paterson.* But, 3. if this application hurts the debtor, *e. g.* by making an appryling to expire, the payment will be imputed

Obligations are dissolved

by implement.

As by payment,

Indefinite payment.

imputed to the preferable right, as the *curator* or *fors*. Where one of the debts has a cautioner adjoined to it, the other not; the application is to be made, *cæteris paribus*, so that both creditor and cautioner may have equal justice done to them, *H. 58.*

Payment
bona fide.

2. Payment made by the debtor upon a mistake in fact, to one whom he believed upon probable grounds to have the right of receiving payment, extinguishes the obligation; *e. g.* payment to one who had been the creditor's factor, but whose factory was recalled, without intimation to the debtor; or payment of rent by a tenant, to the heritor from whom he had the lease, tho' such heritor has been, before the payment, divested in favour of a singular successor: but payment made to one, to whom law has denied the power to receive it, has not this effect, as if a debtor, taken up by letters of caption, should make payment to the messenger; for *ignorantia juris neminem excusat*. In all debts, the debtor, if he is not interpellated, may safely pay before the term, except in tack-duties or feu duties, the payment of which, before they are due, is construed to be collusive, in a question with the creditor of the superiour or heritor, 28. Feb. 1628, *L. Lauchops*. Payment is *in dubio* presumed, by the voucher of the debt being in the hands of the debtor; *chirographum, apud debitorem reperitum, præsimitur solutum*.

Extinction
of obligations
by the creditor's
consent.

3. Obligations are extinguishable by the consent of the creditor, who, without full implement, or even any implement, may discharge the right constituted in his own favour. Tho' a discharge, granted by one whom the debtor

debtor *bona fide* took for the creditor, but who was not, extinguishes the obligation, if the satisfaction made by the debtor was real; yet where it is imaginary, the discharge will not screen him from paying to the true creditor, the debt that he had made no prior satisfaction for, *arg.* 14. Dec. 1661, *Humes*. Whether the obligation be extinguished by actual implement or bare consent, if it has been constituted by writing, the extinction must be proved either by the oath of the creditor, or by a discharge in writing; and the same solemnities which law requires in the obligation, are necessary in the discharge: but, where payment is made, not by the debtor himself, but by the creditor's intromission with the rents of the debtor's estate, or by delivery to him of goods in name of the debtor, such delivery or intromission, being *fatti*, may be proved by witnesses, tho' the debt should have been not only constituted by writing, but made real on the debtor's lands by adjudication.

Discharges of written obligations must be in writing.

But the creditor's intromission with rents may be proved by witnesses.

4. A discharge, tho' it should be general, of all that the granter can demand, extends not to debts of an uncommon kind, which are not presumed to have been under the granter's eye, as obligations of warrandice not incurred, or of relief of debts not yet paid to the creditor, 23. Jan. 1678, *Campbell*, or for performing special prestations, 19. Nov. 1680, *Dalgairno*. A general clause, subjoined to the discharge of a special debt, comprehends all debts of the same sort with that which is specially discharged, tho' they should be for greater sums, 29. June 1705, *Ghappel*; but they do not extend to debts of a different sort, for these the granter

General discharges

Consecu-
tive dis-
charges of
three
terms du-
ties or in-
terests.

is presumed not to have had in view. This doctrine applies also to general assignations. In annual payments, as of rents, feu-duties, interest, &c. three consecutive discharges by the creditor, of the yearly or termly duties, presume the payment of all preceedings. The creditor's heir is, in this question, considered as the same person with the predecessor; but discharges granted by an administrator, as a factor, tutor, &c. presume only the payment of all preceeding duties incurred during his administration. This presumption arises from repeating the discharges thrice successively, and so does not hold in the case of two discharges, tho' they should include the duties of three or more terms.

Extinction
by com-
pensation.

5. Where the same person is both creditor and debtor to another, the mutual obligations, if they are for equal sums, are extinguished by *compensation*; if for unequal, still the lesser obligation is extinguished, and the greater diminished, as far as the concurrence of debt and credit goes. Compensation was not admitted with us, but by way of action, till 1592, c. 141, which first made compensation propo- nable by way of exception. It had, by the *jus novum* of the Romans, its effect *ipso jure*, and consequently, was drawn back to the pe- riod of concurrence, and had its operation from the necessity of law, without regard to the in- tendment of parties, *l. ult. C. de compens.*; but the chief effects given to it by our law, begin from the period of proponing it in judgment. Hence, compensation was not sustained upon a debt prescribed at proponing it, tho' it was a subsisting debt at the time of concurrence, *H. 17.*

It does not
operate
ipso jure.

Hence.

Hence also, a party was allowed to propose compensation, on that debt of the two that was worst secured, tho' the first concurrence was made by the other, 15. Nov. 1738, Sir *W. Maxwel*. Yet we have, from equity, given this effect to compensation, that it stops the currency of interest on both sides, downwards from the time of concurrence. Yet it stops the currency of interest.

6. To found compensation, 1. Each of the parties must be debtor and creditor at the same time: a debtor therefore cannot propound compensation against his creditor's assignee upon a debt due by the cedent, to which the compensator had not acquired right, till after the assignation and intimation. 2. Each of them must be debtor and creditor in their own rights: hence, a tutor cannot compensate a debt properly due by himself, with a sum for which he is creditor, *tutorio nomine*. 3. The mutual debts must be of the same quality. Hence, a sum of money cannot be compensated with a quantity of corns; because, till the prices are fixed at which the corns are to be converted into money, the two debts are incommensurable: hence also, a debt already payable, upon which the creditor may have immediate execution, cannot, in strictness, be compensated with a debt, the term of payment whereof is not yet come. By this rule, a moveable sum cannot be compensated with an heritable debt bearing requisition; because, before requisition, the estate burdened is debtor, more properly than the proprietor, 12, Nov. 1675, *Hume*.

6. Lastly, compensation cannot be admitted, where the mutual debts are not clearly ascertained.

certained, either by a written obligation, the sentence of a judge, or the oath of the party. Where this requires but a short discussion, sentence for the pursuer is delayed for some time *ex aequitate*, that the defender may make his ground of compensation good, according to the rule, *quod statim liquidari potest, pro jam liquido habetur*, 31. July 1707, *Macdonat*. Where a debt for fungibles is ascertained in money, by the sentence of a judge, the compensation can have no effect further back than the liquidation, because, before sentence, the debts were incommensurable: but, where a debt for a sum of money is, in the course of a process, constituted by the oath of the debtor, the compensation, after it is admitted by the judge, operates *retro*, in so far as concerns the currency of annualrents, to the time that, by the parties acknowledgment, the debt became due; for, in this case, the debtor's oath is not what creates the debt or makes it liquid, it only declares that such a liquid sum was truly due before, 4. Dec. 1675, *Watson*. By the above quoted statute 1592, compensation cannot be proponed after decret, either by way of suspension or reduction; but if once proponed and unjustly repelled, it may be again insisted on, either by suspension or reduction. Decreets in absence are not decreets in the sense of this act, whether they are pronounced by an inferior judge, 18. June 1662, *E. Marishal*, or even by the court of Session, if they are afterwards turned into a libel, see 25. July 1676, *Wright*.

8. The right of retention, which bears a near resemblance to compensation, is chiefly competent,

Compensation is not admitted after decret.

Retention.

competent, where the mutual debts, not being liquid, cannot be the ground of compensation; and it is sometimes admitted *ex æquitate*, in liquid debts, where compensation is excluded by statute: thus, tho' compensation cannot be pleaded after decree, either against a creditor or his assignee, yet, if the original creditor should become bankrupt, the debtor, even after decree, may retain against the assignee, till he gives security for satisfying the debtor's claim against the cedent, 18. Feb. 1736, *Maclarin*. This right is frequently founded, in the expence disbursed, or work employed on the subject retained, and so arises from the mutual obligations prestable by the parties, *e. g.* retention by a writer, of the writings belonging to his client, for payment of his account; or retention by a tradesman of any piece of work, till payment of the expence laid out on it, or the price of the workmanship. But retention may be sustained, tho' the debt due to him who claims it, does not arise from the nature of the obligation by which he is debtor: thus, a factor on a land estate may retain the sums uplifted by him in consequence of his factory, not only till he be paid of the disbursements made on occasion of such estate, but also till he be satisfied or relieved of the separate engagements he may have entered into, on his constituent's account; and that, notwithstanding any diligence that may be used by the creditors of the constituent, to affect the sum in the factor's hands, Nov. 1729, *Stark*.

9. Obligations are dissolved by *novation*, ^{Extinction} whereby one obligation is changed into another, ^{by novation,}
 Vol. II. H without on.

without changing either the debtor or creditor. The first obligation being thereby extinguished, the cautioners in it are liberated, and all its consequences discharged; so that the debtor remains bound only by the last. As a creditor, to whom a right is once constituted, ought not to lose it by implication, novation is not easily presumed, and the new obligation is construed rather as corroborative of the old; but, where the second obligation expressly bears to be *in satisfaction* of the first, these words must necessarily be explained into novation: yet see an exception, *St.* 102.

By delegation.

Where the creditor accepts of a new debtor, in place of the former who is liberated, this method of extinction is called *delegation*.

By confusion.

10. Obligations are extinguished by *confusion*, where the debt and credit meet in the same person, either by succession or singular title, *e. g.* when the debtor succeeds to the creditor, or the creditor to the debtor, or a stranger to both, *l.* 21. §. 1. *de liber. leg.*: for one cannot be debtor to himself. If he, on whom the right of the creditor devolves, was only liable as cautioner, the accessory obligation is extinguished, because the debtor and creditor therein come to be the same person; but the principal obligation against the proper debtor subsists: and, by the same reason, tho' it be true that an heir is liable, *in suo ordine*, for his predecessor's moveable debts; yet a moveable debt, due to one who afterwards succeeds as heir to the debtor, is not extinguished *confusione*, but subsists against the executor, who is primarily liable in that sort of debts (3. 9. 28.) Debts or adjudications purchased by an apparent heir, affecting

III.
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Tit. 4. *Extinction of Obligations.* 323

affecting the estate of the predecessor, are not extinguished *confusione* ; for the heir, while he is not entered, does not represent the debtor nor fill his place : and tho' possession upon such rights, subjects him to a passive title, (3. 8. 39.) yet that statutory penalty was enacted, merely in favour of creditors, but does not create a proper representation, nor annul the diligences so acquired, which therefore are effectual to singular successors, *H.* 102. If the succession, from which the confusion arises, happens afterwards to be divided, so as the debtor and creditor become different persons ; the confusion does not operate an extinction, but only a temporary suspension of the debt, *St.* 158 : hence, an assignation, in favour of an heir of tailzy, of a debt affecting the entailed estate, is only suspended during the life of such heir, but may revive after his death, in the person of his heir at law, against the heir of tailzy.

TIT. 5. *Of Assignations.*

AS real rights cloathed with infeftment are transmitted by disposition, which is a writing containing procuratory of resignation and precept of seisin ; so heritable rights, which either require no infeftment, as servitudes, patronages, reversions, &c. or on which infeftment has not actually followed, (as to which see 2. 7. 13.) and also all moveable rights,
are

Assignation.

What rights are not assignable.

Intimation of assignations.

are transmissible by simple assignation. He who grants the assignation, is called the cedent, and he who receives it, the assigney or cessionar: if the assigney conveys his right to a third person, it is called a translation; and, if he assigns it back to the cedent, a retrocession. Certain rights are, from the uses to which they are destined, incapable of transmission, as alimentary rights: others cannot be assigned by the creditor without special powers given to him, as tacks, (2. 6. 13.) reversions, (2. 8. 4.) &c.: the transmission of a third sort is not presumed to be intended, without an express conveyance; as of paraphernal goods, which are so proper to the wife, that a general assignation by her to her husband, of all that did or should belong to her, does not comprehend them, *Dec. 1733, Paton*. A liferent right is by its nature incapable of a proper transmission, but its profits may be assigned. (2. 9. 24.)

2. Assignations must not only be delivered to the assigney, *Harc. (assignation) Jan. 1685, Lady Hysleside*, but intimated by him to the debtor. Intimations have been probably first introduced, merely as an interpellation to the debtor, that he might not pay to the original creditor; but they came afterwards to be considered, as likewise necessary for completing the conveyance, 22. *Jan. 1663, Wallace*; in so much that in a competition between two assignations, the last, if first intimated, is preferred; and hence, the debtor's acquiring a debt due by his creditor makes no concurrence, and so cannot found compensation by the debtor against the creditor's assigney, unless the debtor's

debtor's right has been compleated by intimation before the other, D. 3.

3. Tho' regularly, intimation to the debtor is made by instrument, taken in the hands of a notary, by the assigney or his procurator; yet here the law admits equipollencies, where the notice given to the debtor of the assignment is equally strong: thus, a charge upon letters of horning at the assigney's instance, or a process brought by him against the debtor, supplies the want of intimation; these being judicial acts, which expose the conveyance to the eyes, both of the judge, and of the debtor; or the debtor's promise of payment by writing to the assigney, because that is in effect a corroborating the original debt. The assigney's possession of the right, by entering into payment of the rents or annualrents, serves also as intimation; for it imports, not only notice to the debtor, but his actual compliance: thus, an assignation of a tack, or of the mails and duties of lands, is perfected by the assigney's labouring the ground or levying the rents; and the assignation of a bond, by the payment of annualrents by the debtor to the assigney. Assignations to assignable reversions are compleated by their registration in the register of reversions, which was instituted for the special purpose of publishing such rights with their conveyances, 5. Dec. 1665, *Beg*; but the registration of assignments to personal rights as bonds, contracts, &c. does not supply the want of intimation; because our records were not intended for publication, as to these, but merely for conservation or diligence. The debtor's private knowledge of the assignment

is

is not sustained as intimation, since it imports neither publication nor possession on the part of the assigney.

In what cases notification is not necessary.

4. Certain conveyances need no intimation. 1. Indorsations of bills of exchange, which are not to be fettered with forms introduced by the laws of particular states. 2. Bank-notes are fully conveyed by the bare delivery of them: for, as they are payable to the bearer, their property must pass with their possession. 3. Adjudication which is a judicial conveyance, and marriage which is a legal one, carry the full right of the subjects thereby conveyed without intimation, *St.* 368; nevertheless, as there is nothing in these conveyances before interpellation, which can put the debtor *in mala fide*, he is therefore *in tuto* to pay to the wife, or to the original creditor in the debt adjudged, until the marriage or adjudication be notified to him. Assignments of moveable subjects made *retentia possessione*, (where the cedent retains the possession) cannot hurt the cedent's creditors; for such rights are presumed, in all questions with them, to be collusive and granted in trust for the cedent himself.

Effects of assignation.

5. An assignation carries to the assigney the whole right of the subject conveyed, as it was in the cedent; and consequently, he may raise diligence, either in his cedent's name, while he is alive, or in his own: but diligence, which has been raised in name of the cedent, cannot be executed by the messenger in the assigney's name; for messengers have no power to judge of the import of transmissions, and are confined in their executions to the will of the letters, *II. June 1745, Stuart.* Where

a right is assigned simply in trust, the nature of the trust must determine the effects of the conveyance: if it is intended the trustee shall have* full power over the subject, he may use all acts of property; but, if it is granted for a special purpose, *e. g.* to do diligence, the powers of the trustee, tho' not limited in the right, ought to go no further.

6. After an assignation is intimated, the debtor cannot prove payment or compensation by the oath of the cedent, who has no longer any interest in the debt, unless the matter has been made litigious by a depending process before intimation; but the debtor may refer to the oath of the assigney, who is in the right of the debt, that the assignment was gratuitous or in trust for the cedent; either of which being proved, the oath of the cedent will affect the assigney. The cedent's oath cannot hurt the assigney. If the assignation be in part onerous, and in part gratuitous, the cedent's oath is good against the assigney, only in so far as his right is gratuitous. If the assignation be onerous. 25. Feb. 1679, *Steill.* All defences competent against the original creditor in a moveable debt, which can be proved otherways than by his oath, continue relevant against even an onerous assigney; whose right can be no better than that of his author, and must therefore remain affected with all the burdens which attended it in the author's person. See this question discussed in the case of mutual contracts, *St.* 101; and in the case of personal rights of lands, *St.* 370.

TIT. 6. *Of Arrestments and poyndings.*

Arrest-
ment.

Common
debtor.

The war-
rant of ar-
restment.

In whose
hands it
may be u-
sed.

THE diligences, whereby a creditor may affect his debtor's moveable subjects, are arrestment and poynding. By arrestment is sometimes meant, the securing of a criminal's person till trial, 1487, c. 99; but, as it is understood in the rubric of this title, it is the command of a judge, directed to him who is debtor in a moveable obligation to the arrester's debtor, discharging him from making payment or delivery, till the debt due to the arrester be paid or secured. The arrester's debtor is usually called the common debtor, because, where there are two or more competing creditors, he is debtor to all of them. He, in whose hands the diligence is used, is styled the arrestee.

2. Arrestment may be laid on, by the authority, either of the supreme court, or of an inferior judge. In the first case, it proceeds, either upon special letters of arrestment, or on a warrant contained in letters of horning; and it must be executed by a messenger. The warrants granted by inferior judges are called precepts of arrestment, and they are executed by the officer proper to the court. Where the debtor to the common debtor is a pupil, arrestment is properly used in the hands of the tutor, as the pupil's administrator: this doctrine may

may perhaps extend to other general administrators, as Commissioners, &c.: but arrestment, used in the hands of a factor or steward, cannot found a process of furthcoming, without calling the constituent, 18. Jan. 1709, *Donaldson*. Where the debtor to the common debtor is a corporation, arrestment must be used in the hands of the directors or treasurer who represent the whole body, 10. Jan. 1739, creditors of *Lethem*. Arrestment, when it is used in the hands of the debtor himself, is inept; for that diligence is intended only as a restraint upon third parties.

3. All debts, in which one is personally bound, tho' they should be heritably secured, are grounds upon which the creditor may arrest the moveable estate belonging to his debtor; for every creditor, whatever the nature of his debt may be, ought to have the whole of his debtor's estate subject to his diligence. Arrestment may proceed on a debt, the term of payment whereof is not yet come, in case the debtor be *vergens ad inopiam*, see 16. July 1678, Lord *Pitmedden*. If a debt is not yet constituted by decret or registration, the creditor may raise and execute a summons against his debtor, upon which dependance arrestment may be used, in the same manner as inhibition. If one's ground of credit be for the prestation of a fact, or if his depending process be merely declaratory, without a conclusion of payment or delivery, such claims cannot be the foundation of arrestment, *Dalr.* 6. Jan. 1702, *Blackwood*,—26. Feb. 1712, *Rofs.*

Upon
what debts
it may
proceed.

Arrest-
ment up-
on a de-
pendance.

What
debts are
arrestable.

Neither
bills nor
future
debts,

Nor ali-
mentary
debts are
arrestable.

4. Moveable debts are the proper subject of arrestment; under which are comprehended conditional debts, and even depending claims. For lessening the expence of diligence to creditors, heritable bonds, on which no infestment has followed, are declared arrestable, by 1644, c. 41. revived, by 1661, c. 51; but this act is limited to contracts and obligations, and does not extend to adjudications, wadsets or other personal rights of lands which are not properly debts, 22. Feb. 1666, *Lockhart*. Certain moveable debts are not arrestable, 1. Debts due by bill, which pass from hand to hand as bags of money. 2. Future debts; for, tho' inhibition extends to *acquiritenda* as well as *adquisita*, (2. 11. 4.) yet the warrant of arrestment is limited to the debt due at the time of serving, it against the arrestee; and therefore an arrestment of rents or annualrents carries only these already fallen due: the method for affecting the rents or annualrents of future terms, is by laying on a new arrestment after these terms are come, which may be done on the first warrant. Claims depending on the issue of a suit are not considered as future debts; for the sentence, when pronounced, has a retrospect to the period at which the claim was first founded, 19. Dec. 1744, *Wardrop*. The like doctrine holds in conditional debts. 3. Alimentary debts are not arrestable; for these are granted on personal considerations, and so are not communicable to creditors: but the bygonies due upon such debt may be arrested by the person who has furnished the aliment. One cannot secure his own effects to himself for his aliment, so as they

they shall not be affectable by his creditors, Salaries annexed to offices granted by the King, *Act. S. 11. June 1613*, (see *St. 272. §. 18.*) and the fees of servants, are considered as alimentary funds; but the surplus fee, over and above what is necessary for the servants personal uses, may be arrested, 9. *July 1668, Beg.*

5. In obligations which carry a yearly right to the creditor, if the obligation itself is arrestable, *e. g.* a moveable bond, or an heritable one not cloathed with investment, the principal sum is carried by the arrestment, as well as the bypast interests; and consequently, all the future interests until payment, as accessory to the right itself: but in rights of lands, or in heritable bonds perfected by seisin, no more can be arrested, than the interests or mails and duties that were either fallen due, or at least current, at laying on the arrestment. (Current is that which has begun to run from the last term, but cannot be demanded till the next.) In the same manner, the arrestment of a bond due to a wife, laid on for the debt of the husband, carries only the past and current annualrents; for the right itself does not fall under the *jus mariti*, 19. *Jan. 1739*, creditors of *Glunes*.

6. If, in contempt of the arrestment, the arrestee shall make payment of the sum, or deliver the goods arrested, to the common debtor, he is not only liable criminally for breach of arrestment, (4. 4. 36.) but he must pay the debt again to the arrester. Nay, in the case of arrestment used at the market-cross of *Edinburgh*, and peer and shore of *Leith*, against a person furth of the kingdom, payment, by the arrestee

arrestee to his creditor, after the date of the arrestment, makes him liable in second payment to the arrester; because the arrester had done all in his power to notify his diligence, *F. 22. July 1701, Blackwood.* Arrestment is, by our later practice, not merely prohibitory, as inhibitions are, but is a step of diligence which founds the user in a subsequent process, whereby the property of the subject arrested may be adjudged to him; it therefore does not fall by the death of the arrestee, but continues to subsist as a foundation for an action of furthercoming against his heir, while the subject arrested remains *in medio*, *22. Dec. 1738, E. Aberdeen.* Far less is arrestment lost, either by the death of the arrester, or of the common debtor.

Arrestment does not fall by the death of the arrestee's death.

Loosing of arrestment.

Loosing not admitted but on payment or consignation, in registered obligations. Exceptions.

7. Where arrestment proceeds on a depending action, it may be loosed by the common debtor's finding security to the arrester for his debt, in the event it shall be found due. By the antient practice, the receiving of this caution was committed intirely to the messenger, whose certificate, that caution was found, effectually loosed the arrestment: but all bonds of caution in loosings are now to be received by the clerk to the bills, and recorded in the books of Session, *1617, c. 17.* Arrestment founded on decreets, or on registred obligations, which in the judgment of law are decreets, cannot be loosed but upon payment or consignation; except, 1. Where the term of payment of the debt is not yet come, or the condition has not yet existed. 2. Where the arrestment has proceeded on a registred contract where the debts or mutual prestations are not liquid,

liquid, 31. *July 1705, Macfarlan.* 3. Where the decret is suspended or turned into a libel; for, till the suspension be discussed or the process concluded, it cannot be known whether the debt be truly due. A loosing takes off the *nexus* which had been laid upon the subject arrested; so that the arrestee may thereafter pay safely to his creditor, and the cautioner is substituted in place of the arrestment, for the creditor's security: yet the arrester may, while the subject continues in the arrestee's hands, pursue him in a furthcoming, notwithstanding the loosing, 7. *Feb. 1665, Grabam.*

Effect of
loosing.

8. Arrestment is only an inchoated or begun diligence; to perfect it, there must be an action brought by the arrester against the arrestee, to make the debt or subject arrested furthcoming. In this action, the common debtor must be called for his interest, that he may have an opportunity of excepting to the validity or extent of the debt on which the diligence proceeded. Tho' an arrestment cannot be executed without the territory of the judge who granted the precept, (1. 2. 1.) yet one inferior judge is competent to a furthcoming, upon an arrestment laid on by the warrant of another, *St. 371.—23. June 1710, Dalrymple.* Before a furthcoming can be pursued, the debt, owing by the common debtor to the arrester, must be liquidated; for the arrester can be no further intitled to the subject arrested, than to the extent of the debt due to him by the common debtor. If the pursuer cannot instruct the debt owing by the arrestee *scripto*, he must refer it to his oath. Where the subject arrested is a sum of money, it is, by the decret

Furthcoming on
arrestment.

Before
whom can
it be pursued.

The ar-
rester's
debt must
be first li-
quidated.

Decreet of
furthco-
ming is
really an
assignati-
on.

Arrest-
ments are
preferred
by their
dates.

Provided
the arrester
insists in
his furth-
coming.

decree of furthcoming, directed to be paid to the pursuer towards satisfying his debt; where goods are arrested, the judge ordains them to be put to sale, and the price to be delivered to the pursuer, 12. Nov. 1680, *Stevenson*: so that in either case, decreets of furthcoming are judicial assignations to the arrester of the subject arrested.

9. In all competitions, regard is had to the dates, not of the grounds of debt, but of the diligences proceeding upon them. In the competition of arrestments, the preference is governed by their dates, according to the priority even of hours, where it appears with any certainty, which is the first. But, as arrestment is but an inchoated diligence, therefore, if a prior arrester shall neglect to insist in an action of furthcoming, for such a time as may be reasonably construed into a desertion of his begun diligence; he loses that preference which it was in his power to have obtained for himself, and the last arrester is preferred: but the distance of above two years between the first arrestment and the decree of furthcoming, was found not to make such a *mora*, as to intitle the posterior arrester to a preference, Jan. 1724. *Nairn*. This rule of preference, according to the dates of the several arrestments, holds, whether they have proceeded on a decree, or on a dependance; on debts not yet payable, or on debts already payable; provided the dependance shall have been closed, or the debt have become payable, before the issue of the competition, 14. June 1710, *Brody*.—H. 100.

10. In

10. In the competition of arrestments with assignations, an assignation by the common debtor, intimated before arrestment, is preferable to the arrestment; for, by the intimated assignation, the debtor is fully denuded, after which the subject cannot be arrested as his. If the assignation is granted before arrestment, but not intimated till after it, the arrester is preferred; for arrestment renders the subject litigious, and so excludes every voluntary right of the debtor, either granted after the diligence, or not compleated till after it. From these rules a third necessarily follows, that, if the intimation and arrestment are of equal dates, they are preferable *pari passu*, unless the arrester has neglected to compleat his diligence by a furthcoming.

Rules of preference between arresters and assignees.

11. Poynding is that diligence affecting moveable subjects, whereby their property is carried directly to the creditor. Real poynding, which proceeds on real debts or *debita fundi*, is treated of below. 4. 1. 3. Personal poynding may have for its warrant, either letters of horning containing a clause for poynding, and then it is executed by messengers; or precepts of poynding granted by Sheriffs, Commissaries, &c. which are executed by their proper officers. No poynding can proceed, till a charge be given to the debtor to pay or perform, and the days thereof be expired, by 1669, c. 4, except poyndings against vassals for their feuduties, and poyndings against tenants for rent, proceeding upon the heritor's own decret, in which the antient custom of poynding without a previous charge is continued. A debtor's goods may be poynded by one creditor, tho' they

Poynding.

Its warrant.

A previous charge must be given. Except in poyndings for feuduties or rents.

Arrest-
ment is no
bar to
poynding.

they have been arrested before by another; for arrestment being but an imperfect diligence, leaves the right of the subject still in the debtor, and so cannot hinder a creditor from using a more perfect diligence, which has the effect of carrying the property at once to himself.

What sub-
jects may
be poynd-
ed.

No goods
pertaining
to the
plough
can be
poynded
in the time
of labour.

12. It is only goods belonging to the debtor that can be poynded. Antiently, the tenant's goods might be poynded for his master's debt, either real or personal, to the full extent of the debt, even tho' the tenant had not been in arrear of rent: this was restricted, by 1469, c. 37, to the extent of the rent due by the tenant; but now, of a long time, no poynding has proceeded, even to the least extent, against a tenant, for his master's personal debt. No cattle pertaining to the plough, nor instruments of tillage could, by the *Roman law*, l. 7. 8. *C. quae res pign. obl.* be poynded; nor can they by ours, in the time of labouring the ground, unless where the debtor has no other goods that may be poynded, 1503, c. 98. By labouring time is understood that time, in which the particular tenant, whose goods are to be poynded, is plowing, tho' he should have been earlier or later than his neighbours, 20. June 1712, *Arnot*; but summer following does not fall under the act, 22. Nov. 1628, *Watson*. Tho' the statute discharges such poynding, not only where the debtor has moveables, but even where he has lands that may be apprysed, this last part of the alternative is fallen into disuse, F. 7. Dec. 1692, *Turner*. In

13. In the execution of poynding, the debtor's goods must be appretiated, first on the ground of the lands where they are laid hold on, and a second time at the market cross of the jurisdiction, by the stated appretiators of the bounds; or, if there are none, by persons named by the messenger or other officer employed in the diligence. Next, the messenger must, after public intimation by three oyeses, declare the value of the goods according to second apprysement, and require the debtor to make payment of the debt, including interest and expences. If payment shall be offered to the creditor, or in his absence to the messenger who, as judge constituted to the poynding, has authority to receive it; or if, in case of refusal by the creditor or messenger, consignation of the debt shall be made in the hands of the judge ordinary, the goods must be left with the debtor: if not, they ought to be delivered to the user of the diligence towards his payment; and the debtor is intitled to a copy of the warrant and executions, as a voucher that the debt is satisfied, in whole or in part, by the poynding.

14. Ministers may, by 1663, c. 21, poynd for their stipends upon one appretiation on the ground of the lands; and heritors were always in use to poynd so, for their rents, *Balfour*, (Barons) c. 10.—17. Dec. 1735, L. Keir. By the late jurisdiction act, 20mo Geo. II. the appretiation of the goods at the market-cross of the nearest royal burgh, or even of the nearest head-burgh of stewartry or regality, though these jurisdictions be abolished, is declared as sufficient, as if they were carried to the head-burgh ent.

burgh of the shire. Poynding, whether it be considered as a sentence, or as the execution of a sentence, must be proceeded in betwixt sun rising and sun setting; or at least it must be finished before the going off of daylight; 11. Feb. 1675, *Douglafs*; see F. 10.

The power of the messenger in poynding.

Nov. 1703, *Gordon*. The powers of the officer employed in the execution of poyndings, are not clearly defined by custom, in the case of a third party, claiming the goods to be poynded as his own. This is certain, that he may take the oath of the claimant upon the verity of his claim, and if from thence it appears that the claimant's title is collusive, he ought to proceed in the diligence: but, if there remains the least doubt, his safest course is to deliver the goods to the claimant, and to express in his execution the reasons why poynding did not proceed. A claimant, or other person who stops a poynding *via facti* on groundless pretences, is liable, both criminal-ly, in the pains of deforcement, (4. 4. 34.) and civilly, in the value of the goods which might have been poynded by the creditor.

Deforcement of the messenger.

TIT. 7. Of Prescriptions.

Prescription, which is a method both of establishing and of extinguishing property, is either positive or negative. Positive prescription is generally defined, as the *Roman usucapio*, the acquisition of property, (it should rather be, the securing it against all further challenge) by the possessor's continuing his possession for the time which law has declared sufficient for that purpose: negative, is the loss or amission of a right, by neglecting to follow it furth or use it, for the time limited by law. The doctrine of prescription, which is by some writers condemned as contrary to justice, has been introduced, that the claims of negligent creditors might not subsist forever, that property might be at last fixed, and forgeries discouraged, which the difficulty of detecting must have made exceeding frequent, if no length of time had limited the legal effects of writings.

2. Positive prescription was first introduced into our law, by 1617, c. 12, which enacts, that whoever shall have possessed his lands, annualrents or other heritages, peaceably, in virtue of infestments, for 40 years continually after their dates, shall not thereafter be disquieted in his right, by any person pretending a better title. Under *heritages* are comprehended

hended wadsets, fairs or markets, and every other right or privilege that is *fundo annexum*. Continued possession, if proved as far back as the memory of man, presumes possession upwards to the date of the infeftment. The whole forty years possession must be upon seifins, by the expreis words of the act; and consequently, no part thereof on the bare right of apparency, 15. Feb. 1671, *E. Agyll*; but forty years possession without seifin is sufficient in servitudes, and such other heritable rights as do not require seifin to perfect them. A subject may be acquired by prescription, tho' it is not expressed in the infeftment, if it has been possessed for 40 years, as part and pertinent of another subject specially expressed in it. (2. 6. 5.)

Its title.

3. The act requires, that the possessor produce, as his title of prescription, a charter of the lands preceeding the forty years possession, with the seifin following on it; and, where there is no charter extant, seifins, one or more, standing together for forty years, and proceeding either on retours or precepts of *clare constat*. This has given rise to a reasonable distinction made in practice, between the prescription of a singular successor and that of an heir. Singular successors must produce for their title of prescription, not only a seifin, but its warrant, as a charter, disposition, &c. either in their own person or their predecessor's; but the production by an heir of seifins, one or more, standing together for forty years, and proceeding on retours or precepts of *clare constat*, is sufficient. The heir is not obliged to produce the retours or precepts on which his seifins

sins proceed, 9. Nov. 1739, *Purdy*; nor is the singular successor obliged to produce the ground of his charter, 1741, *Ged*; so that if the title of prescription produced, be a fair deed and an habile title of property, the possessor is secure by the act, which admits no ground of challenge, but falsehood. A special statute for establishing the positive prescription in moveable rights was not necessary; for, since a title in writing is not requisite for the acquiring of these, the negative prescription, by which all right of action for recovering their property is cut off, (see next §.) effectually secures the possessor.

4. The negative prescription of obligations, ^{Negative} by the lapse of 40 years, was introduced into ^{prescription.} our law long before the positive, by 1469, c. 29.—1474, c. 55. This prescription is now amplified by the foresaid act 1617, which has extended it to all actions competent to heritable bonds, reversions and others whatsoever: unless where the reversions are either incorporated in the body of the wadset right, or registered in the register of reversions: and reversions so incorporated or registered are not only exempted from the negative prescription, but they are an effectual bar against any person from pleading the positive, *H.* 92.

5. A shorter negative prescription is introduced by statute in certain rights and debts. ^{Shorter} ^{negative} ^{prescription.} Actions of spuilzy, ejection, and others of that ^{ons.} nature, must be pursued within three years after the fact on which the action is founded, by 1579, c. 81. As in spuilzies and ejections, ^{Prescripti-} the pursuer was intitled, ^{on of spuil-} in odium of violence, ^{zy and e,} to a proof by his own oath in *litem*, and to the ^{jction,} violent

violent profits against the defender, the statute meant only to limit these special privileges by a three years prescription, without cutting off the right of action, where the claim is restricted to simple restitution, 16. March 1627, *Hay*. Under the general words, *and others of that nature*, are comprehended all actions, where the pursuer is admitted to prove his libel, by his own oath *in litem*.

6. Servants fees, house rents, men's ordinarys (*i. e.* money due for board) and merchants accounts, fall under the triennial prescription, by 1579, *c.* 83. There is also a general clause subjoined to the statute, of *other debts of the like nature*, which includes alimentary debts, *Br. MS.* 25. July 1716, *Hamilton*, wages due to workmen, *F.* 21. Dec. 1692, *Bayne*, and accounts due to writers, agents or procurators, 16. Dec. 1675, *Somervel*. These debts may, by this act, be proved after the three years, either by the writing or oath of the defender; so that they prescribe only as to the mean of proof by witnesses. In the prescription of house rents, servants' fees and aliment, each term's rent, fee or aliment, runs a separate course of prescription; so that in a pursuit for them, the claim will be restricted, to what is fallen due within the three years immediately before the citation, 12. Feb. 1680, *Ross*,—14. Jan. 1737, *Ferguson*: but in accounts, prescription does not begin till the last article; for a single article cannot be called an account, 16. Dec. 1675, *Somervel*. The currency of an account, the first part of which was furnished to a defunct, is preserved by new furnishings within the three years to his heir, who

Prescription of servants fees, house-rents, and merchants accounts.

The period from which these prescriptions commence.

Servants wages
3 years

who is *eadem persona cum defuncto*, 26. Feb. 1670, *Graham*. Actions of removing must also be pursued within three years after the warning, by 1579, c. 82. Prescription of removing.

7. Reductions of erroneous retours, and processes of error against the inquest, did prescribe, if not pursued, within three years after the service, by 1494, c. 57, which term is lengthened to twenty years, as to the reduction of retours, by 1617, c. 13. This last has the appearance of a declaratory statute, as if the former had only meant to save the inquest from processes of error, not to cut off the right of reduction by the triennial prescription; but it does both in express words: and therefore the last act contains a special clause, that these who had, before the date of it, acquired right to lands from persons retoured thereto, shall enjoy their rights as the law then stood. It statutes in general, that all erroneous retours shall be free from challenge after 20 years, and so is not to be confined, as Sir *Geo. Mackenzie* conjectures in his observations upon it, to the competition of different kinds of heirs between themselves, e. g. an heir of line and an heir of tailzy. Prescription of retours and processes of error.

8. Ministers stipends and multures prescribe in 5 years after they are due; and arrears of rent, (or mails and duties) 5 years after the tenant's removing from the lands, by 1669, c. 9: but the said debts may be thereafter proved to be resting owing, by the writ or oath of the debtor. Stipends due during a vacancy do not seem to fall under, either the letter, or spirit of this act. As the prescription of mails and duties was introduced chiefly in favour Prescription of ministers stipends, multures, and arrears of rent.

Of bar-
gains of
move-
ables.

And of
arrest-
ments.

Prescripti-
on of cau-
tionry en-
gage-
ments.

your of poor tenants, a fiar, who had got tack of lands from the liferenter, was found not intitled to the benefit of it, 9 Dec. 1709, *L. Philiphaugh*; nor a tacksmen of one's whole estate who had power to remove tenants, 20 July 1733, *L. Carfin*. By this statute also bargains concerning moveables or sums of money which are provable by witnesses, cannot be proved but by writing or the oath of the debtor, if they are not pursued for, within 5 years after the bargain. These words are so explained by some, that if, after expiring of the 5 years, the debtor shall acknowledge the constitution of the bargain, it will not avail him, tho' he should adject to his oath that he has made payment; but this interpretation appears contrary, both to practice, 14 Jan. 1737, *Moffat*, and to the nature of such bargains: (4. 2. 6.) A quinquennial prescription is established by the same statute, in arrestments, whether upon decreets or depending actions: the first prescribe, in 5 years after the date of the decret; and the last, in 5 years after sentence is pronounced on the dependance.

9. All obligations by which one stands bound for or with another, either as cautioner or as co-principal in a bond or contract for sums of money, prescribe in 7 years from the date of the bond; provided such obligee has either a clause of relief in the bond, or a separate obligation of relief, intimated to the creditor at his receiving the bond, 1695, c. 5. Tho' diligence should be used against the cautioner within the 7 years, he is no further bound than for the principal sum, and interest fallen due

*Paulhanan
obligations 7 years*

due within that period. This act being intended to prevent the bad consequences of rash engagements, its benefit cannot be renounced by the cautioner, *Edg. 19. Feb. 1724, Norie.* As it is correctory, it is strictly interpreted: thus, bonds bearing a mutual clause of relief *pro rata* fall not under it, *21. Jan. 1708, Ballantyne*; nor bonds of corroboration, *Br. 61. 15. Dec. 1747, Lady Henr. Gordon.* The statute excludes all cautionries for the faithful discharge of offices; these not being obligations in a bond or contract for sums of money: and practice has refused the benefit of it to all judicial cautioners, as cautioners in a suspension. Actions of count and reckoning, competent, *Prescripti-* either to minors against their tutors or curators, *on of tu-* or *vice versa*, prescribe, by 1696, c. 9, in *tory ac-* ten years after the majority or death of the *counts.* minor.

10. By the before cited 1669, c. 9, holo- *Prescripti-* graph bonds, missive letters and books of ac- *on of ho-* count, not attested by witnesses, prescribe in 20 *lograph* years, unless the creditor shall thereafter prove *writings,* the verity of the subscription by the debtor's oath; so that, to save from the effect of this prescription, it is sufficient to prove the constitution of the debt by the party's oath after the 20 years: whereas in stipends, merchants accounts, &c. not only the constitution, but the subsistence of the debt, must be proved by writ or oath, after the years of prescription. Some lawyers extend this vicennial prescription to obligations for such sums, not exceeding 100 *L. Scots*, as are not attested by witnesses; but the act 1540, c. 117, requires all deeds, without any exception, to be subscribed before witnesses,

Prescription of certain actions.

Extinction of obligations without prescription by taciturnity.

Bona fides presumed in the positive prescription.

nesses, under the certification of nullity. Tho' in several of the before mentioned short prescriptions, the action itself is said to prescribe, no more is truly meant than the right of action, if not exercised within the limited time; for where action was once pursued, it subsisted like any other right for 40 years. As this tended to defeat the design of the statutes establishing these prescriptions, it was enacted, by 1669, *c.* 9, joined with 1685, *c.* 14, that all actions, pursued upon warnings, spuilzies, ejections or arrestments, or for payment of the debts specially contained in the act 1669, should prescribe in 5 years, if not wakened within that time.

11. Certain obligations are lost by the lapse of less than 40 years, without the aid of statute, where the nature of the obligation and circumstances of parties justify it: thus, action has been refused on bills, seeing bills are not intended for lasting securities, upon 24 or 25 years taciturnity in the creditor; unless the granter be alive, and the subsistence of the debt offered to be proved by his oath, *F. v.* 2. 48. and 248: thus likewise, a receipt for bills granted by a writer, to his employer, not insisted upon for 23 years, was found not productive of an action, *F. v.* 2. 74. The prescriptions of privileges, *e. g.* of the restitution of minors, of the benefit of inventory, of deliberating, &c. are explained in their proper places.

12. In the positive prescription, as established by the act 1617, the continued possession for forty years, proceeding upon a title of property and not quarrelled upon falshood, secures

cures the possessor against all other grounds of challenge, and so presumes *bona fides, praesumptione juris et de jure*, 27. Nov. 1677, *Grant*.

In the long negative prescription, *bona fides* in the debtor is not required; the creditor's neglecting to insist for so long a time, is construed as a dereliction of his debt, and so is equivalent to a discharge. Hence, tho' the subsistence of the debt should be referred to the debtor's own oath, after the forty years, he is not liable, *F. 7. Dec. 1703, Napier*.

13. Prescription runs *de momento in momentum*: the whole time defined by law must be compleated, before a right can be either acquired or lost by it; so that interruption, made on the last day of the fortieth year, breaks its course. Civil possession (2. 1. 12.) has the same effects with natural, in all questions of prescription, either positive or negative. The positive prescription runs in all cases against the Sovereign himself, by the express words of the act 1617, even as to his annexed property, 1633, c. 12; but in the negative prescription, the King cannot suffer by the negligence of his officers, in the management of processses, where the crown is a party, 1600, c. 14.

The negative, as well as the positive prescription, runs against communities and hospitals, tho' their overseers are administrators only, and not proprietors; and against the church, tho' churchmen have but a temporary interest in their benefices. But in regard the rights of beneficiaries to their stipends are much liable to accidents, through the frequent change of incumbents, thirteen years possession does, by a rule of the *Roman* chancery

It is not required in the long negative prescription.

Prescription runs *de momento in momentum*.

The positive prescription runs against the King.

And against communities.

And against the church.

Decennalis et triennalis possessio.

cery which we have adopted, found a presumptive title in the beneficiary; *decennalis et triennalis possessor non tenetur docere de titulo*: but this is not properly prescription, for, if by titles recovered perhaps out of the incumbent's own hands, it shall appear that he has possessed teinds or other subjects to a greater extent than he ought, his possession will be restricted accordingly, 23. July 1708, *Rule*. This right must not be confounded with that established in favour of churchmen, by *Act. S. 16. Dec. 1612*, (2. 9. 17.) which is confined to church lands and rents, and seems to constitute a proper prescription upon a possession of 30 years,

Does prescription run against minors?

14. Whether the clause in the act 1617, saving minors from prescription, was meant to extend to the positive as well as the negative prescription, is doubtful; but, however that may be, the exception of minority is not admitted in the case of hospitals for children, where there is a continual succession of minors, that being a *casus insolitus*, *F. 17. Dec. 1695*, *Heriot's hospital*. Minors are expressly excepted in several of the short prescriptions, as 1579, c. 81.—1669, c. 9. But, where law leaves them in the common case, they must be subject to the common rules.

It does not run contra non valentem agere.

15. Prescription does not run *contra non valentem agere*, against one who is barred by some legal incapacity from pursuing, 25. Jan. 1678, *D. Lauderdale*; for in such case, neither negligence nor dereliction can be imputed to him. This rule is by a favourable interpretation, extended to wives who, *ex reverentia maritali*, forbear to pursue actions competent to them against their husbands, 5. July 1665, *Macky*; but

but every prescription runs against wives in favour of third parties. On the same ground, prescription runs only from the time the debt could have been pursued: thus, prescription of a right of warrandice runs only from the eviction, 1617, c. 12; because no man is liable in warrandice, till the subject disposed be evicted; and inhibition prescribes only from the date of the deed that is done to the inhibitor's prejudice, F. 32. And even in the prescription of removings on warnings, where statute expressly warrants the commencement of it, from the date of the warning, 1579, c. 82, the years are computed from the term at which the defender is warned to remove, 6. Feb. 1629, Borthwick. Neither can prescription run against persons who are already in possession, and so can gain nothing by a pursuit. Thus, where a person who has two adjudications affecting the same estate, is in possession upon one of them, prescription cannot run against the other, during such possession, see 26. Nov. 1728, Fraser.

16. Certain rights are incapable of prescription, 1. Things that law has exempted from commerce. (2. 1. 2.) Of this sort were tithes, which being wholly appropriated before the reformation to sacred uses, could not be made the property of private persons: but now they are *juris privati*, unless in so far as they are actually destined for the maintenance of the clergy; and consequently, may be acquired by the positive prescription, but they cannot be lost by the negative. (below §. 17.) Things stolen or possessed by violence, were so far *extra commercium* by the Roman law, that they could

It does not commence till the debt can be pursued for.

Res extra commercium cannot be acquired by prescription.

But things stolen may.

not

Faculties
cannot be
lost by
prescrip-
tion.

Nor ex-
ceptions,

If they
be not pro-
ductive of
an action.

Obligati-
ons of
yearly
prestati-
ons cannot
prescribe.

not be acquired by usucapion, even in the person of a *bona fides* possessor; but this, and all other grounds of challenge, seem to have been cut off by the *praescriptio longissimi temporis*, l. 3. 4. *C. de praescr. 30 vel 40 ann.*: neither does our statute of prescription make any such exception. 2. *Res merae facultatis*, e. g. a faculty to burden, to revoke, &c. cannot be lost by prescription, 14. *March 1707*, *L. Bimmerfide*; for faculties may, by their nature, be exercised at any time: hence, a proprietor's right of building, or using any other act of property on his own grounds, cannot be lost by the greatest length of time, tho' a neighbouring heritor should happen to be hurt by the exercise of it. (2. 9. 10.) 3. Exceptions competent to a person for eliding an action, cannot prescribe, if they are founded on simple discharges; because discharges are intended to have no further operation, and cannot produce an action, whereby the prescription may be interrupted: but, where the exception is founded on a right productive of an action, e. g. compensation, such right must be insisted on, within the years of prescription. (3. 4. 5.) 4. Obligations of yearly pensions or prestatations, tho' diligence be not used on them for 40 years, do not suffer a total prescription; but still subsist as to the bygones fallen due within that period, l. 7. §. 6. *C. de praescr. 30 vel 40 ann.*—*July 1730*, *Lockhart*; because prescription cannot run against an obligation till it is payable, and each year's pension or prestatation is considered as a separate debt. But in bonds which carry a yearly interest, seeing the obligation is but one, and can be implemented

at

at once, the interest is no more than an accessory to the principal sum; and therefore if diligence be neglected for 40 years, the obligation itself is prescribed, and consequently, all the annualrents as accessories.

17. No right can be lost *non utendo* by one, unless the effect of that prescription be to establish the right in another. From this principle, the rule arises, *juri sanguinis nunquam praescribitur*. One may, at the greatest distance of time after his predecessor's death, serve heir to him, if no other be served during that period; for in such case, there can be no interest vested in any person to found an opposition:

hence also, the proprietor of a land estate cannot lose his property by the negative prescription, if he who objects it, cannot himself plead the positive, in terms of the act 1617, *Edgar, 20. July 1725, Paton*. On the same grounds, a superiour's right of feu-duties cannot be lost *non utendo*; because, being inherent in the superiority, it is truly a right of lands, that cannot suffer the negative prescription, except in favour of one who can plead the positive; which the vassal cannot do, being destitute of a title. This rule applies also to parsonage teinds, which are an inherent burden upon all lands not specially exempted; and from which therefore the person liable can

Nor the right of blood.

He who objects the negative prescription in heritage must himself plead the positive.

Feu-duties cannot be lost by the negative prescription.

Nor parsonage teinds.

not prescribe an immunity by bare non-payment: but such vicarage teinds, as are only due where they are established by usage, may be lost by prescription, *F. 24. July 1678, L. Grant. (2. 10. 5.)* In all these cases, tho' the radical right cannot suffer the negative prescription, the bygone duties not demanded within

within the 40 years, are lost to the proprietor, superiour, or titular.

Interruption of prescription.

18. Prescription may be interrupted, by any deed whereby the proprietor or creditor uses his right or ground of debt. It is not only the proprietor or creditor himself who can interrupt, but his heir in the bare right of appearance: and even in interruption made by one who had only a putative title, the true creditor afterwards pursuing, tho' he derived no right from the interrupter, was found intitled to the benefit thereof, *F. v. i. 136, E. Bradalbane.*

Registration makes no interruption.

In all interruptions, the possessor of the subject or the debtor, must be certiorated that the proprietor or creditor intends to follow further his right; and consequently, registration of the ground of debt, tho' it be in some respects considered as a decret, yet as the defender is not

Nor citations on blank summonses.

cited to it, makes no interruption; nor citations which proceeded on blank summonses, because these had no relation to any special ground of debt. All writings, whereby the debtor himself acknowledges the debt, and all processses for payment raised, or diligences used against him upon his obligation, by horning, inhibition, arrestment, &c. must be effectual to interrupt prescription.

All interruptions by citation prescribe in 7 years, if not renewed.

19. Interruptions by citation upon libelled summonses, where they are not used by a minor, prescribe, if not renewed every 7 years, by 1669, c. 10: but, where the comparance of parties, or any judicial act has followed thereupon, it is no longer a bare citation, but an action, which subsists for 40 years. By this statute, citations for interrupting the prescription of real rights, must be given by messengers;

messengers ; and, by 1696, c. 19, the summonses, on which such citations proceed, must pass the signet, and be registred within 60 days after the execution, in a particular register appointed for that purpose : and, where interruption is made *via facti*, as to real rights, an instrument must be taken upon it, and recorded in the said register ; otherways it can have no effect against singular successors.

Requisites
of interrup-
tion in
the pre-
scription
of real
rights.

20. Interruption has the effect to cut off the course of prescription, so that the person prescribing, can avail himself of no part of the former time, but must begin a new course, commencing from the date of the interruption. Minority therefore is no proper interruption, for it neither breaks the course of prescription, nor is it a document taken by the minor on his right : it is a personal privilege competent to him, by which the operation of the prescription is indeed suspended, during the years of minority, which are therefore discounted from it ; but it continues to run after majority, and the years before and after the minority may be conjoined to make it up. The same doctrine applies to the privilege arising from one's incapacity to act, *supr.* §. 15.

Effect of
interru-
ption.

Minority
is not in-
terrupti-
on.

21. Diligence used upon a debt, against any one of two or more co-obligants, preserves the debt itself, and so interrupts prescription against all of them ; unless in the special case of cautioners, who are not affected by diligence used against the principal debtor, 1695, c. 5. In the same manner, a right of annual rent, constituted upon two separate tenements, is preserved as to both, from the negative prescription, by diligence used against either of

In what
cases in-
terruption
against
one person
or subject,
secures the
whole
right from
prescrip-
tion.

them, 22. June 1671, Lord *Balmerino*: but whether such diligence has also the effect, to hinder the possessor of the other tenement by singular titles, from acquiring by the positive prescription, may be doubted, notwithstanding the authority of that decision; for no interruption can be said to be thereby made against the possessor; and, if he continues his possession for the term of prescription, he seems to be precisely in the case of the statute 1617. This is certain, that interruption made against the possessor of a barony, by arresting or uplifting the mails and duties of any part of it, interrupts his prescription of the whole; for a barony is *nomen universitatis* or *unum quid*. (2. 6. 7.)

TIT. 8. Of Succession in heritable Rights.

Successors
singular
and uni-
versal.

Singular successors are these who succeed to a person yet alive, in a special subject by singular titles; but succession, in its proper sense, is a method of transmitting rights from the dead to the living. Heritable rights descend by succession to the heir, properly so called; moveable rights, to the executors, who are sometimes said to be heirs in moveables. Succession is either by special destination, which descends to those named by the proprietor himself; or legal, which devolves upon the persons whom the law marks out for successors, from a presumption that the proprietor would have

Succession
by special
destinati-
on; and
legal suc-
cession.

have named them, had he made a destination. The first is in all cases preferred to the other, as presumption must yield to truth.

2. In the succession of heritage, the heirs at law are otherwise called heirs general, heirs whatsoever, or heirs of line; and they succeed by the right of blood in the following order. First descendants, whose preference before ascendants or collaterals is established by the universal consent of nations. The *Romans* divided the succession equally among all the immediate descendants of the deceased; but we, from our close attention to the feudal plan, prefer sons to daughters, and the eldest son to all the younger. Where there are daughters only, they succeed equally, and are called heirs portioners. Failing immediate descendants, grand-children succeed; and in default of them, great grand-children, and so on *in infinitum*; preferring, as in the former case, males to females, and the eldest male to the younger.

3. Next after descendants, collaterals succeed; among whom the brothers *german* of the deceased have the first place, *i. e.* brothers both by father and mother; for full blood excludes half blood. But, as in no case, the legal succession of heritage is, by the law of *Scotland*, divided into parts, unless where it descends to females; the defunct's immediate younger brother excludes the rest, according to the rule, *heritage descends*. Where the defunct is himself the youngest, the succession goes to the immediate elder brother, as being the least deviation from this rule, *F. 9.* If there are no brothers *german*, the sisters *german* succeed equally, then brothers *consanguinean*,

Order of
succession
in heri-
tage.

Heirs at
law.
Descen-
dants.

Collate-
rals.

Ascen-
dants.

No succes-
sion by the
mother.

Right of
represen-
tation in
heritage.

Successio in
capita.

Successio in
stirpes.

nean, *i. e.* by the father only, in the same order as brothers german; and failing them, sisters *consanguinean* equally. Next the father succeeds, tho' by our antient usage he was excluded, Cr. 321; after him, his brothers and sisters according to the rules already explained; then the grand-father; failing him, his brothers and sisters, and so upwards as far back as propinquity can be proved. Tho' children succeed to their mother, a mother cannot, to her child, nor is there any succession by our law through the mother of the deceased; in so much that one brother *uterine, i. e.* by the mother only, cannot succeed to another, even in that estate which flowed originally from their common mother, 5. Feb. 1663, *Lennox*.

4. In heritage there is a right of representation, by which one succeeds, not in his own person, but in the vice of, and as representing some of his deceased ascendants. Thus, where one leaves a younger son, and a grandchild by his eldest, the grandchild, tho' further removed in degree from the defunct than his uncle, excludes him, as coming in place of his father the eldest son. Hence arises the distinction between succession *in capita*, where the division is made into as many equal parts as there are *capita* or heirs, which is the case of heirs portions; and succession *in stirpes*, where the remoter heirs draw no more among them, than the share belonging to their ascendant or *stirps* whom they represent: an example of which may be figured in the case of a defunct, leaving a daughter alive, and two grand-daughters by a daughter deceased. Tho' the right of succession does, in no case, devolve to the mother

mother of the deceased, nor to his relations by her; yet as children succeed to their mother, therefore in every case where the mother herself would have succeeded, had she been alive, her children also succeed, as representing her.

5. In the succession of heirs portioners, in-
divisible rights, *e. g.* titles of dignity, fall to the eldest sister. A single right of superiority goes also to the eldest; for it hardly admits of a division, and the condition of the vassal ought not to be made worse by multiplying superiours upon him. Where there are more such rights, the eldest may perhaps have her election of the best; but the younger sisters are intitled to a recompence, in so far as the divisions are unequal; at least, where the superiorities yield a constant yearly rent, *e. g.* a yearly feu-duty. The principal seat of the family falls to the eldest with the garden and orchard belonging to it, without recompence to the younger sisters, 1743, *Pedies*: but all other houses are divided, together with the lands on which they are built, as parts and pertinents of these lands.

Succession
of heirs
portion-
ers.

6. These heritable rights to which the de-
funct did himself succeed as heir to his father
or other predecessor, get sometimes the name
of heritage in a strict sense, in opposition to the
feuda nova or feus of conquest, which he had
acquired by singular titles, and which descend,
not to his heir of line, but of conquest. This
distinction obtains only where two or more bro-
thers or uncles, or their issue, are next in suc-
cession; in which case, the immediate young-
er brother as heir of line succeeds to the pro-
per

Heir of
conquest.

Has no
place in
female
succession.

What is
included
in con-
quest.

Heirship-
move-
ables.

per heritage, because that descends; whereas the conquest ascends to the immediate elder brother, *2. Att. c. 88.* It has no place in female succession, which the law divides equally among the heirs portioners, *H. 3.* Where the defunct was the youngest brother, the immediate elder brother, whether of the same or of a former marriage, is heir both of line and of conquest, *20. July 1664, Lady Clerkington,* contrary to the opinion of *Craig, p. 336.* An estate disposed by a father to his eldest son is not conquest in the son's person, but heritage; because he would have succeeded to it, tho' there had been no disposition. The heir of conquest succeeds to these subjects and to these only, on which investment has or might have followed, *Hope Min. Pr. p. 40.* All rights therefore of lands or other feudal subjects, tho' they should remain personal without seisin, are comprehended under conquest, *8. Jan. 1740, D. Hamilton;* but tacks and other rights bearing a tract of future time, fall by this rule to the heir of line. Bonds without a clause of investment, taken to heirs including executors, go also to the heir of line, not only because they are rights incapable of investment, but because they are heritable, not *ex sua natura*, but by the force of destination; and therefore that heir is understood in the destination, who is heir in the most proper sense, *8. Jan. 1740, D. Hamilton.*

7. The heir of line is intitled to the succession, not only of subjects properly heritable, but to that sort of moveables called *heirship*, which is the best of certain kinds, *1474, c. 54.* This doctrine has been probably introduced

ced, that the heir might not have an house and estate to succeed to, quite dismantled by the executor. The list of heirship-moveables contained in *L. B. c. 125*, is imperfect; for all such lists must be greater or less, according to the variety of moveables belonging to the deceased. In that sort which goes by pairs or dozens, the best pair or dozen is the heirship. There is no heirship in fungibles or things estimated by quantity, as grain, hay, current money, &c. To intitle an heir to this privilege, the defunct must have been either, 1. A Prelate. 2. A Baron, *i. e.* one who stood inest at his death in lands, tho' not erected into a barony, or even in a right of annualrent; or 3. A burgher; not an honorary one, but a trading burgher of a royal burgh, or at least one intitled to enter burgher in the right of his predecessor, *F. 22. Nov. 1698, Cumin*. Neither the heir of conquest nor of tailzie has right to heirship-moveables.

What is included in them.

Every defunct cannot transmit them.

They fall only to the heir of line.

8. As to succession by destination, no proprietor can settle any heritable estate in the proper form of a testament; not even bonds including executors, tho' these are not heritable *ex sua natura*: but, where a testament is in part drawn up in the style of a deed *inter vivos*, such part of it may contain a settlement of heritage, tho' executors should be named in the testamentary part. The common method of settling the succession of heritage, is by disposition, contract of marriage, or simple procuratory of resignation: and, tho' a disposition settling heritage should have neither precept nor procuratory, it will have the effect to compel the heir of line to make up titles to the estate,

Heritage cannot be settled by testament.

Heirs of
tailzy and
of provi-
sion.

How they
differ.

Heir male.

Simple de-
stination

Lays no
restraint
on the
heir.

state, and thereafter divest himself in favour of the disponent. All heirs by destination may properly enough be called, by a general name, heirs of tailzy, from *tailler* to cut, because the lineal succession is cut off in their favour; but they are usually distinguished into heirs of tailzy and of provision. The appellation of tailzy or entail is chiefly used in the case of a land estate, which is settled on a long series of heirs substituted to one another; whereas heirs pointed out in contracts of marriage, or in bonds containing clauses of substitution, are more commonly called heirs of provision. The person first called in the tailzy is the institute, the rest the substitutes. Tailzies are frequently made in favour of the heir-male, *i. e.* of the nearest legal heir to the granter, who is himself a male, and whose propinquity is wholly connected by males, without the intervention of any female.

9. Tailzies, when considered in relation to their several degrees of force, are either, 1. Simple destinations. 2. Tailzies with prohibitory clauses; or 3. Tailzies with prohibitory, resolute and irritant clauses. That is a simple destination, where the persons called to the succession are substituted one after another, without any restraint laid on the exercise of their property. The heirs therefore succeeding to the estate are absolute fiars, and consequently, may alter the destination at pleasure: nor can inhibition used against them by the next substitute, cut off this right of fee; for inhibition supposes an antecedent obligation on the debtor, which that diligence is intended to secure to the creditor; whereas in a simple destination,

destination, the several heirs ly under no obligation, and the substitutes have only the hope of succession.

10. In tailzies with clauses prohibitory, *i. e.* that it shall not be lawful to the heirs to contract debts or alienate the lands, in prejudice of the succession, none of the heirs can alienate gratuitously; for a proper right of credit is thereby created to the several substitutes, who may in the character of creditors reduce such alienations upon the statute 1621, afterwards to be explained, *F. 28. Jan. 1687, E. Callander.* And tho' the members of entail may contract debts which will be effectual to the creditors, or may dispose of the estate for onerous causes, since the fee subsists in their person; yet the substitutes may, as creditors by the prohibitory clause, secure themselves against the effect of future contractions, by inhibition. In both these sorts, the maker himself may alter the tailzy; unless, 1. Where it has been granted for an onerous cause, as in mutual tailzies, 14. *Jan. 1631, Sharp*, or, 2. Where the prohibitory clause disables the maker himself, as well as the heirs, *Br. 119.*

11. Where a tailzy is guarded with irritant and resolute clauses, the estate entailed cannot be carried off by the debt or deed of any of the heirs succeeding thereto, in prejudice of the substitutes. It was long doubted, whether such tailzies ought to be effectual, even where the superiour's consent was adhibited; because they sunk the property of estates and created a perpetuity of liferents. The first judgment confirming them, was 26. *Feb. 1662, V. Stormount*; and thereafter they were explicitly

Tailzies with prohibitory clauses cannot be altered gratuitously.

Inhibition may be served upon them by the substitute.

Tailzies with irritant and resolute clauses.

Their re-
quisites.

authorised, by 1685, c. 22. By this statute, the entail must be registred in a special register established for that purpose; and the irritant clauses inserted, not only in the procuratories, precepts, and seifins, by which the tailzies are first constituted, but in all the after-conveyances thereof; otherways they can have no force against singular successors, see *H.* 52: but a tailzy, even without these requisites, is effectual against the heir of the granter, or against the institute who accepts of it, *H.* 47. That part of the act which requires the registration of tailzies in order to their affecting singular successors, was found to have no retrospect to tailzies made prior thereto, *H.* 89; but this was reversed by a judgment of the house of Peers: and indeed, the security of creditors calls for registration equally in all tailzies, and the act 1690, c. 33, makes no exception. It is an agreed point, that the act 1685 regulates the posterior transmissions, even of tailzies dated before it; so that in all these, the irritant clauses must be repeated, *H.* 60. Retours upon general services are not properly transmissions of an estate; they only give right to unexecuted procuratories of resignation and precepts of seifin: yet it was found, *H.* 79, that retours on general services fell under the statute; but this decision was reversed upon an appeal.

They are
*stricti ju-
ris.*

12. Tailzies, being an unfavourable restraint upon property, and a frequent snare to trading people, are *strictissimi juris*; so that no irritancies can be inferred by implication: hence, tho' all debts to be contracted by the heir should, by the deed of entail, be declared null

null, but without irritating the right of the heir contracting, 22. July 1712, creditors of *Ricarton*; or *vice versa*, tho' there should be a clause irritating the right of the heir who contracts, but without declaring the debts contracted null, 11. July 1734, *Bailly*; the court will not interpose to supply the defect from presumed intention. For the same reason, a prohibition to alter the succession, tho' fortified by an irritant clause, does not disable the heir from contracting debt, *F. v. I.* 116; nor does a prohibition to contract debt hinder him from selling, *F. v.* 2. 92.

13. An heir who counteracts the directions of the tailzy, by alienating any part of the estate, charging it with debt, &c. is said to contraveen. It is not the simple contracting of debt that infers contravention; the lands entailed must be actually adjudged upon the debt contracted, *H.* 34. An heir may, without contravention, settle a jointure on his wife, not exceeding the terce; because the provisions of law are not excluded in tailzies, *H.* 90: but the settling of provisions on younger children, being a deed not of the law, but of the granter, imports contravention, *Feb.* 1730, *Borthwick*. It is not quite clear from the words of the act 1685, whether the contraveener forfeits, not only for himself, but for the heirs of his body, where there is no express clause in the entail settling it; but the more favourable opinion, which confines the penalty to the person offending, has been received by a decision, *F. 6. Jan.* 1697, *Simpson*. Yet, for the greater security, a clause has been inserted in some late tailzies, that the forfeiture shall not affect the

What deeds infer contravention.

Does the contraveener forfeit for the heirs of his body?

the descendants of the contraveener, when such is the intention of the entail. Before the next heir can take the estate on the contravention of the former, he must declare the irritancy against the contraveener; after which, he is directed by the statute to serve himself heir to him who died last inest in the fee, and did not contraveen.

How the heir serves upon a declarator of irritancy.

In what cases an heir of entail may sell.

14. When the heirs of the last person specially called in a tailzy come to succeed, the irritancies have no longer any person in favour of whom they can operate; and consequently, the fee, which was before tailzied, becomes simple and unlimited in the person of such heirs, 29. Dec. 1710, *Lefly*. By the late act for abolishing ward-holdings, 20mo Geo. II. c. 50, the King may purchase lands within *Scotland*, notwithstanding the strictest entail; and, by act 51 of the same year, where the lands are in the hands of minors or fatuous persons, he may purchase them from the curators or guardians. These acts appear, by their preamble, to be limited to lands lying in the Highlands of *Scotland*, but the enacting words of both are general. By the first of these statutes, heirs of entail may sell to their vassals, the superiorities belonging to the entailed estate: but in all these cases, the price is to be settled in the same manner, that the lands or superiorities sold were settled before the sale.

Rights taken in conjunct fee to strangers.

15. Rights, not only of land estates, but of bonds, (which last are called *quasi feuda* or *feuda nominum*) are sometimes granted to two or more persons in conjunct fee. Where a right is so granted to two strangers, without any special clause adjected to it, each of them has an

an equal interest in the fee, and the part of the deceased does not accrue to the survivor, but descends to his own heir. Where they are granted to the two in fee, and to the heirs of one of them, he to whose heirs the right is taken is the only fiar; the right of the other resolves into a simple liferent. If the right is taken to the two jointly, and the longest liver and their heirs, the several shares of the conjunct fiars are affectable by their creditors during their lives; but, on the death of any one of them, the survivor has the fee of the whole, exclusive of the heir of the predeceased, in so far as the share of the predeceased remains free after payment of his debts, *F. v. 1. 206.*

16. Where a right is taken to a husband and wife in conjunct fee and liferent, the husband, as the *persona dignior*, is the only fiar: the wife's right resolves into a liferent, unless it be presumable from special circumstances that the fee was intended to be in the wife, e. g. if the right flowed from her, or if the last termination of the settlement falls on the wife's heirs, or if the right be taken to her assignees, *4. Feb. 1709, Fead*: but even these presumptions for the wife may be over-balanced by stronger in favour of the husband, *Dirlet. Doubts. V. Fee.—21. Nov. 1705*, creditors of *Paterfon*. Where a right of moveables is taken to husband and wife, the heirs of both succeed equally, according to the natural meaning of the words, *2. Feb. 1632, Bartholemew*. In rights taken by a father to himself and his son jointly, and the heirs of the son, the father is the only fiar, even tho' the son should be interest on the right; because all rights by fathers

To husband and wife.

To father and son.

to

to children are considered as rights of succession, unless a plain intention shall appear in the father from the tenor of the grant, to divest himself, and state the son in the fee.

Heirs of provision,

17. Heirs of provision are these who succeed to any subject in virtue of a provision in the investiture or other deed of settlement. This appellation is given most commonly to heirs of a marriage. These are more favourably regarded than heirs by a simple destination, who have only the hope of succession; for heirs of a marriage, because their provisions are stipulated by an onerous contract, cannot be disappointed of them by any gratuitous deed of the father, and they may pursue him to purge incumbrances, or to make their provisions good in the event of his death, 5. Dec. 1734, *Fotheringham*.

Heirs of a marriage,

Cannot be disappointed by gratuitous deeds.

But the father can contract debt.

Unless he expressly restrain himself.

Nevertheless, as their right is only a right of succession, which is not designed to restrain the father from granting onerous or rational deeds, he continues to have the full power of selling the subject or charging it with debts, unless a proper right of credit be given to the heir by the marriage contract, *i. g.* if the father should oblige himself to invest the heir in the lands, or make payment of the sum provided, against a day certain, or when the child attains a certain age, *H. 45. 51*; or if the father should be restrained from the contracting of debt; for such rights, when perfected by investment, or secured by diligence, are effectual against all the posterior deeds of the father, even onerous, see *F. 30*. Nothing but the hope of a right is created to such of the substitutes in a marriage contract as are called after the issue of the marriage; for the parties contracting

contracting (the husband and wife) are interested no further than to provide their issue of that marriage: as to the other substitutes, it is a simple destination, alterable at pleasure.

18. Where parties intermarry without a written contract, trusting to the legal provisions, any postnuptial contract or other right that may be afterward granted in favour of the children is deemed gratuitous; and therefore its validity, in a question with the creditors of the granter, will depend intirely upon his solvency at the date of such right; nor can it be supported by a recital in the right itself, that the articles therein contained were agreed upon before marriage, which can be no evidence against third parties: but postnuptial settlements in favour of wives are, in the judgment of law, onerous. (4. 1. 13.) A father may, notwithstanding a first marriage contract, settle a jointure on a second wife, or provide the children of a second marriage, for such settlements are deemed onerous; but, where they are exorbitant, they will be restricted to what is rational: and in all such settlements, where the provisions of the first marriage contract are incroached upon, the heirs of that marriage have recourse against the father, in case he should afterwards acquire a separate estate which may enable him to fulfil both obligations, 27. Jan. 1730, *Henderson*.

The effect of postnuptial contracts.

His powers of providing for a second marriage contract.

19. In marriage contracts, the conquest or a certain part thereof, is frequently provided to the issue; by which is understood whatever real addition shall be made to the fathers's estate during the marriage, by purchase or donation:

Provision of conquest in a marriage contract.

Provision
taken to
bairns.

nation : conquest therefore must be free, *i. e.* the debts must be deducted in the computation. What the husband succeeds to during the marriage, as heir to a predecessor, is not conquest. As in other provisions, so in conquest, the father is still fiar, and may therefore dispose of it for onerous or rational causes. Where heritable rights are provided to the *heirs* of a marriage, they fall to the eldest son, for he is the heir at law in heritage. Where a sum of money is so provided, the word *heir* is applied to the subject of the provision, and so marks out the executor who is the heir in moveables, *H. 95.* Where an heritable right is provided to the *bairns* (or issue) of a marriage, it is divided equally among the children, if no division be made by the father ; for such destination cuts off the exclusive right of the legal heir, 29. *Jan. 1678, Steuart.* No provision granted to bairns gives a special right of credit to any one child, as long as the father lives : the right is granted *familiae*, so that the whole must indeed go to one or other of them, but the father has a power inherent in him to divide it among them in such proportions as he thinks best ; yet so as none of them may be intirely excluded, 16. *Dec. 1738, Campbell* ; except in extraordinary cases, an instance of which, in a provision even to the heir of a marriage, may be seen in *H. 50.*

Different
acceptations
of the
word heir.

20. Tho' by the general term of *heir* is understood, in the common case, the heir whom law points out, yet where there has been an antecedent destination of a subject, limiting the succession to a certain order of heirs, the word *heir*, in all the posterior settlements, either

ther of that subject, or of any other intimately connected with it, signifies, not the legal heir, but the heir of the investiture. Thus, if one who has taken a right of lands to his heir male, should thereafter acquire a right of reversion of these lands to his heirs indefinitely; such reversion would go, not to the heir at law, but to the heir male. Upon the same principle, if a superiour of lands should afterwards acquire the property, or a proprietor the teinds; such posterior acquisitions would not descend to the heir of conquest, tho' they were purchased by the predecessor; but to that heir to whom the first rights were provided, 8. Jan. 1740, D. Hamilton.

21. As by the *Roman* law, no man could substitute an heir to his own heir who was past puberty, their substitutions were really no more than conditional institutions, which meant only that, if the institute either could not, or was not willing to take the succession, the substitute might; but, where the succession was actually taken up by the institute, it devolved, after his death, to his own heir, and not to the substitute. With us, clauses of substitution, when inserted in tailzies, have been always understood to give the substitute a right, at what time soever the institute died, *quandocunque defecerit*, altho' he had taken the succession before his death: and substitutions in testaments, 13. July 1681, *Cbrystie*, marriage contracts and bonds, *Harc. (Contract of marriage)* 4. March 1685, *Gordon*,—17 Nov. 1747, *Anderson*, are also governed by the same rule; unless it be presumable, from special circumstances, that a conditional institution was only intended,

What, by the *Roman* law.

What, by ours.

4. Feb. 1642, *Lutfit*, -F. 23. Feb. 1697, *Dickson*, yet see *Dirlet. Doubts. V. Substitution in Legacies.*

It is either simple, no more than the hope of succession, *supr. §. 9*; but, where there is a prohibition adjoined that no deed shall be done to its prejudice, the institute cannot dispose of the subject, unless for onerous or at least rational causes, 8. July 1673, *Graham*. A prohibition is implied in the substitution of children mutually to one another, *Mill. 34*.

Provision of return.

22. A clause of return is that, by which a sum in a bond or other right is in a certain event limited to return to the granter himself or his heirs.

Its effects

When a right is granted for onerous causes, *e. g.* a bond for borrowed money, the creditor may defeat the clause of return even gratuitously; because such clause is presumed to proceed merely from his own good will, and so is of the nature of a simple destination, 18. Nov. 1680, *Murray*. But, where the sum in the right flows from the granter, as in bonds of provision, donations, &c. or where there is any other reasonable cause for the provision of return in his favour; the receiver cannot disappoint it gratuitously, 31. Jan. 1679, *Drummond*: yet since he is a fiar, the sum may be either assigned by him for an onerous cause, or affected by his creditors; nay, he may uplift it, without finding security that the return shall be made effectual, seeing his faith was trusted at granting the right; unless he be *vergens ad inopiam*, 10. July 1747, *Beatson*.

All heirs represent the defunct universally.

23. An heir is, in the judgment of law, *eadem persona cum defuncto*, and so represents the defunct universally, not only in his rights, but in

in his debts: in the first view, he is said to be heir *active*; in the second, *passive*. From this general rule are excepted, heirs substituted in a special bond, 3. July 1666, *Fleming*; and heirs of provision, even tho' their right be not limited to a special subject, 5. June 1745, *Mercer*: for such heirs are considered as singular successors, and their right as a legacy, which does not subject them, *passive*, beyond the value. But heirs male, or of tailzy, tho' their right be limited to special subjects, are nevertheless liable, not merely to the extent of the right entailed or provided, but *in solidum*; because such rights are designed to carry an universal character, and so infer an universal representation of the granter.

24. The heir of line is primarily liable for the debts of his predecessor; for he is the most proper heir, and so must be discussed by creditors, before any other can be pursued. Next to him, the heir of conquest; because he also succeeds to the *universitas* of the whole heritable rights which his predecessor had acquired by singular titles. Then the heir male, or of a marriage; for their propinquity of blood subjects them more directly than any other heir of tailzy who is a stranger, and who, for that reason, is not liable till all the rest be discussed, unless for such of the predecessor's debts or deeds, as relate specially to the lands tailzied; as to which he is liable even before the heir of line. Heirs portioners are liable *pro rata* for their predecessor's debts; but, if any of them prove insolvent, the creditor may, after discussing her, insist for her share against the rest, D. 10; who will be liable, not indeed *in solidum*,

Except heirs substituted in a bond, or heirs of provision.

The order in which heirs are liable.

Relief a-
mong
heirs.

lidum, but to the extent of the benefit accruing to them by the succession, *F. 21. June 1698, White*. Where an heir, liable *subsidiarie*, pays the predecessor's debt, he has relief against the heir, who is more directly liable; in respect of whom, he is not co-heir, but creditor. (3. 4. 10.)

Apparent
heirs their
privileges.

25. Before an heir can have an active title to his predecessor's rights, he must be entered by service and retour. He who is intitled to enter heir, is, before his actual entry, called apparent heir. The bare right of apparen- cy carries certain privileges with it. An apparent heir may defend his predecessor's titles against any third party who brings them under challenge, 19. *Jan. 1627. L. Rossin*. Tenants may safely pay him their rents; and, after they have once acknowledged him by pay- ment, he can compel them to continue it, *Gilmor. 94*. The older decisions considered the rents, unuplifted by an apparent heir who was entered into possession, as his property; in so much that they might not only be affected, du- ring his life, by the diligence of creditors, but even confirmed after his death by his executors; but in truth, tho' apparen- cy be a title of pos- session, the rents which the heir did not really uplift, and to which he had made up no right by entry before his death, must, from the ne- cessity of law, be *in baereditate jacente* of the per- son last infest. *Harc. (Airs) Feb. 1688, Bal- gon*.

*Jus delibe-
randi.*

26. As an heir is by his entry subjected u- niversally to his predecessor's debts, apparent heirs have therefore a year (*annus deliberandi*) allowed to them from the defunct's death, to deliberate

deliberate whether they will enter or not, *ut C. de jure delib.* till the expiring of which, tho' they may be charged by creditors to enter, they cannot be pursued in any process founded upon such charge. Tho' declaratory actions, and others which contain no personal conclusion, may be pursued against the apparent heir without a previous charge; action does not lie, even upon these, within the year, because the heir can make no defence without incurring a passive title, 26. *June 1667, Deuar.* but judicial sales, commenced against a defunct, may proceed upon a citation of the heir, without waiting the year of deliberating, by a special act of *federunt*, 23. *Nov. 1711, §. 5.* This *annus deliberandi* is computed, in the case of a posthumous heir, from the birth of such heir. An apparent heir, who, by immixing with the estate of his predecessor, is as much subjected to his debts as if he had entered, can have no longer a right to deliberate whether he will enter or not, *D. 450.*

27. The apparent heir may, even after this year is expired, pursue against havers, *i. e.* custodians or possessors, exhibition of all writings pertaining to the defunct, and also of all deeds granted by the defunct, whether to these of his own family or to strangers, *Br. 112*; that he may thereby be enabled to balance his predecessor's estate with his debts. An apparent heir, who has renounced the succession, cannot pursue exhibition against that creditor at whose suit he was charged to enter heir; because his renunciation upon the charge imports an approbation of the charger's right, *Jan. 1721, Richardson*: but such renunciation

Protects
the heir
from suits
for a year.

And in-
titled him
to pursue
exhibition
even after
the year.

on

on does not exclude exhibition against any other creditor; its effect being restricted to the special debt which was the foundation of the charge, 8. Jan. 1675, *Waird*. For other privileges of apparency, see 2. 9. 33—2. 12. 25.

Service of
heirs.

Proceeds
on a brief.

Which is
retour-
able.

28. All services proceed on brieves from the chancery, which are called brieves of inquest, and have been long known in *Scotland*, *St. R. 3. c. 1*. The judge to whom the brief is directed is required to try the matter by an inquest of 15 sworn men; which inquest cannot sit till 15 days after the brief has been proclaimed at the market-cross of the head burgh of the jurisdiction, 1509, *c. 94*: and this proclamation to all and sundry, supercedes the necessity of citing any particular person as party to the service. The inquest, if they find the claim verified, must declare the claimant heir to the defunct, by a verdict or service, which the judge must attest. The brief of inquest was from the beginning retourable, *i. e.* the service behoved to be returned to the chancery, *St. R. 3. c. 1*: but it would appear that, for some centuries, the party obtainer of the brief got back the service from the chancery; for many of our oldest families have at this day in their keeping, the authentic services of their predecessors with the seals of the inquest appended to them: and hence, a principal service dated before 1550, was sustained, tho' there had been no evidence of its having been retoured to the chancery, 17. Feb. 1624, Lord *Elphinston*. But, from that time, no service has been deemed compleat, till it be retoured, *F. 2. Feb. 1698, Macintosh*, after which,

which, the heir served may, on his application, get an extract thereof from the chancery; but the service is compleat, tho' such extract should not be demanded. The brief of mortancestry (*de morte antecessoris*) was the ground of a proper action, and related to the particular case, where the heir was kept from the possession of the lands, by the superiour or other person pretending right to them, who therefore behoved to be summoned as a party to the suit, *R. M. l. 3. c. 28. et seqq.*—*2. Att. c. 52.*

Brief of
mortance-
stry.

29. The service of heirs is either general or special. A general service vests the heir in the right of all heritable subjects, which either do not require seisin, as reversions, bonds secluding executors, heirship-moveables, &c. or which have not been perfected by seisin in the predecessor's person, as dispositions, heritable bonds, &c.: but it can carry no right cloathed with infeftment, not even the personal obligation contained in a right of annualrent on which seisin had followed, *Jan. 1729; Lord Halkerton.* The brief on which a general service proceeds, may be directed to any judge ordinary, *6. March 1630, L. Caskeyben,* and must be proclaimed in the jurisdiction where it is to be served. A special service, followed by special seisin, vests the heir in the right of the special subjects in which the predecessor died infeft: and the brief must be directed, either to the Sheriff of the county, or Bailly of the burgh, where the subjects lie; or, by special warrant of the court of Session, to delegates, generally the macers of the Session, to whom the Lords, in cases of difficulty, join one or two of their own number as assessors. The proclamation of this

Service.

Special
service.

Some-
time com-
mitted to
delegates.

this brief must in all cases be at the head-burgh of the jurisdiction where the lands lie. The style of all briefs, whether a general or a special service be intended, is the same, and contains 7 distinct heads which the inquest is commanded to answer. Where the heir claims to be served in special, all of them must be answered; but in a general service, the inquest answers only the two first.

Heads of
the brief
answered
in a gene-
ral service.

30. The two questions to be answered in a general service are, first, Whether the predecessor died at the peace of the King. This is inquired into on account of the fisk; for, where one dies in rebellion, his whole estate forfeits to the crown: but the affirmative is presumed, unless actual rebellion be proved. Rebellion in consequence of a denunciation upon letters of horning, is no bar to the service, 21. Nov. 1626, *Seton*. The second question is, Whether the claimant be the next and lawful heir to the defunct. The legitimacy is presumed; but the propinquity must be proved, either by witnesses, or, if it be remote, by proper evidence in writing. The particular degrees, by which it is connected, ought to be specially set forth in the claim and service, 22. July 1629, *E. Cassils*. That degree which is proved, is presumed to be the nearest, unless the proof of a nearer be instantly offered; and the remotest degree excludes the crown's right as *ultimus haeres*.

Heads in
a special
service.

31. In a special service, the claimant must prove, upon the first head, the precise time of the predecessor's death, that it may be known how long the lands have been in non-entry; and that the deceased stood infeft, at his death,
in

in the lands contained in the claim, which is instructed by his seisin. The following five heads are also inquired into, in a special service. 1. Of what superiour the lands are held. 2. By what manner of holding. 3. What their extent is, both old and new. This serves to fix the rate of the superiour's casualties, which is governed by the new extent; and, perhaps, was also intended to ascertain the heir's proportion of public subsidies, which, till 1649, was regulated by the old extent. (2. 5. 16.) As the non-entry, due out of the lands formerly holden ward of the crown, is now proportioned by the valued rent, (2. 5. 18.) the late act for abolishing ward-holdings provides that the valuation shall also be inserted in the retours of such lands. 4. Whether the claimant be of lawful age. This head was formerly necessary in ward-holdings, in which the superiour was not bound to enter the heir, while he was minor; but now, that ward-holdings are abolished, the question must be always answered in the affirmative. The last head, in whose hands the fee has been, since the predecessor's death, serves to shew whether non-entry be due; for, if the lands have been in the hands of a tercer or liferenter, it is excluded. (2. 5. 20.)

32. If an heir, doubtful whether the estate of his predecessor be sufficient for clearing its debts, shall, at any time within the *annus delib-* ^{Entry of an heir by inventory.}
herandi, exhibite upon oath a full inventory of all the defunct's heritable subjects, to the clerk of the shire where the lands lie; or, if there is no heritage requiring seisin, to the clerk of the shire where he died; and if, after the same is

subscribed by the Sheriff or Sheriff depute, the clerk and himself, it shall be registred in the register appointed for that purpose; his subsequent entry will subject him no further than to the value of such inventory, 1695, c. 24; borrowed from l. 22. §. 2. 3. 4. *C. de jure delib.* If the inventory is given up and registred within the time prescribed, the heir may serve on it, even after the year, *F. 11. Feb. 1708, Mackay.*

Creditors
need not
rest on an
estimation
of the in-
ventory by
witnesses.

33. There is good ground to conclude, both from the rubric and tenor of this statute, that it was designed, not to deprive creditors of the right of making the most of their deceased debtor's estate, but merely to save the heir from an universal representation. Creditors therefore are not obliged to acquiesce in any presumed value that may arise from the opinion or estimation of witnesses, but may bring the estate to a public sale, in order to discover its true value; seeing an estate is always worth what can be got for it, 12. *July 1738, heirs of L. Glenkindy.* An heir *cum beneficio inventarii*, as he is, in effect, a trustee for the creditors, must account for that value to which the estate may have been improved since the death of the predecessor, 6. *July 1727, Aikenhead:* and he is obliged to communicate to all the creditors, the cases he has got in transacting with any one of them, *Dec. 1725, Aikenhead.* He may, upon a sale, pay the price to the creditors who first apply, *June 1733, Veitch;* but, after he is interpellated, he ought to call all of them in a multiple poynding, that the price may be divided among them according to their respective diligences.

An heir by
inventory
is a trustee
for the
creditors.

34. Practice has introduced a special sort of Entry up-
 entry without the interposition of an inquest, ^{on a pre-}
 by the sole consent of the superiour, who, if he ^{cept of}
 be satisfied that the person applying to him is ^{clare con-}
 the nearest heir, grants him a precept, (called ^{stat.}
 of *clare constat*, from the first words of its reci-
 tal) commanding his bailly to infest him in
 the subjects that belonged to his predecessor.
 These precepts are, no doubt, effectual against
 the superiour who grants them, and his heirs ;
 and they may, when followed by seisin, afford
 a title of prescription ; but, as no person can
 be declared an heir by private authority, they
 cannot bar the true heir from entering after
 twenty years, as a legal entry would have done.
 Of the same nature is the entry by hasp and ^{Entry by}
 staple, commonly used in burgage tenements ^{hasp and}
 of houses, by which the bailly, without calling ^{staple.}
 an inquest, cognosces a person heir, upon evi-
 dence brought before himself ; and, at the
 same time, infests him in the subject, by the
 symbol of the hasp and staple of the door.
 How far charges given by creditors to appa-
 rent heirs to enter, stand in place of an actual
 entry, so as to support the creditor's diligence,
 has been explained, 2. 12. 5.

35. A service declaring the claimant to be ^{The ser-}
 nearest and lawful heir carries all the rights ^{vice must}
 which descend to the heir of line by legal succe- ^{describe}
 sion ; but it carries no right that has been spe- ^{the special}
 cially provided to a certain order of heirs by a ^{character}
 tailzy or marriage contract, even tho', by the ^{of the}
 failure of the prior substitutes, the claimant ^{heir who}
 shall happen to be also heir of provision ; for ^{claims.}
 the service must be necessarily restricted to the
 claim laid before the inquest, and the evidence
 brought

brought in support of it, 21. July 1738, *Edgar*: in all succession therefore by special provision, the service must describe the heir by the particular character under which he claims.

A special service includes a general one of the same kind. A general service cannot include a special one, seeing it has no relation to any special subject, and carries only such rights as are not perfected by investment; but a special service implies a general one of the same kind or character, and consequently, carries even these rights that have not been clothed with investment; for, if the verdicts returning an answer affirmative, to the two first heads of the brief, vests these rights in the heir, their answering them jointly with the other five heads must have the same effect.

In what cases service is not required.

36. Service is not required to establish the heir's right in titles of honour, or offices of the highest dignity; which descend *jure sanguinis*. As the bare right of apparenacy intitles an heir to continue his predecessor's possession, *supr.* §. 25; an heir may, even without a service, not only uplift the rents of a land estate, but enjoy a tack or any other temporary right belonging to his predecessor: but, as the property of these subjects is not, by this privilege, vested in the apparent heir, it may be doubted whether he can assign such tack to another, more than he can convey his predecessor's land estate; for it is the proprietor alone who has a right to assign. One who is *nominatim* substituted in a bond immediately after the creditor, needs no service for proving that the creditor is dead; but, where a bond is taken to one and the heirs of his body, whom failing to a substitute, a service must be obtained by the substitute,

substitute, to instruct that the heirs called before him have failed; *St. 455*. No right cloathed with infestment can, in any case, be transmitted to substitutes without service.

37. A special service does not carry, out of the *hereditas jacens* of the defunct, the special subjects in which he died infest, until the heir compleat it by seisin. Where the lands hold of the crown, precepts are issued from the chancery for infesting the heir, which must be directed to the Sheriff, who is thereby required to take security from the heir, for the non-entry and relief duties due to the crown. In lands holden of a subject, the heir may, in place of the former tedious method of running precepts against the superiour, *H. Min. Pr. 55*, obtain a warrant from the court of Session, for letters of horning to charge the superiour to receive him. Where the superiour is not himself entered, such charge would be inept; in that case therefore, the heir must, in terms of 1474, c. 58, charge the superiour to enter himself, within 40 days, in the superiority, that so he may be in a capacity of entering his vassal, under the penalty of losing his right for life. If the superiour refuses to obey either of these charges, the Lords will, upon a process at the heir's instance against him, ordain the next superiour, as coming in his place (*supplendo vices*) to infest the pursuer: and in this manner, the heir may proceed against all the intermediate superiours between him and the Sovereign, against whom a charge is not only improper, but unnecessary; for the crown refuses none, see *Dallas's Styles* p. 234.

Service must be compleated by seisin.

What if the superiour shall refuse to enter the heir.

Passive
titles in
heritage.

*Gestio pro
haerede.*

From
what facts
inferred.

38. An heir, by immixing with his predecessor's estate without entry, subjects himself to his debts as if he had entered; or, in our law phrase, incurs a passive title. The only passive title by which an apparent heir becomes liable universally for all his predecessor's debts, is *gestio pro haerede*, or his behaving himself so as none but an heir has right to do, *l. 20. pr. de qdq. vel omit. haer.* Behaviour as heir is inferred from the apparent heir's intromission after the death of the predecessor, either by himself, his tenants or factors, with any part of the heritage, or other subjects belonging to the defunct, to which he himself might have made up an active title by entry; even with heirship moveables, which, in the doctrine of succession, are considered as heritage; or with the defunct's title-deeds or other writings. It is inferred without actual intromission, by the heir's conveying to a third party, or even discharging rents or other subjects that would belong to him as apparent heir, see 10. Feb. 1642, *Johnston*: but his bare renunciation of the succession, in favour of another, does not infer it, because nothing is thereby transmitted to the receiver, hurtful to creditors, 5. July 1666, *Scot.*

39. This passive title is excluded, if the heir's intromission be by order of law, *e. g.* intromission with heirship-moveables in consequence of confirmation; or if it be founded on singular titles, and not as heir to the defunct; *e. g.* if he has intermeddled with the heirship as donatary from the crown to the single escheat of the defunct, or if he has uplifted the rents of the defunct's estate in virtue of

of an adjudication led against it, to which he had acquired a right. This last defence was always sustained, though the adjudication had proceeded on a bond granted by the heir himself, till the Lords declared, by *Act. S. 28. Feb. 1662*, that intromission by the heir, in virtue of an adjudication led on his own bond, should infer a passive title. And it is now enacted, by *A special fort introduced by statute. 1695, c. 24*, that an apparent heir's purchasing any right to his predecessor's estate, otherways than at a public roup, (auktion) or his possessing the estate in virtue of rights settled in the person of any such near relation of the predecessor, to whom he himself may succeed as heir, otherways than upon purchase by public roup, shall be deemed behaviour as heir.

40. Behaviour as heir is also excluded, where the intromission is small, unless an intention to defraud the defunct's creditors be presumable from circumstances accompanying it, *6. Nov. 1622, L. Dundas*. Neither is behaviour inferred against the apparent heir from his payment of his predecessor's debt, which is a voluntary act and profitable to the creditors; nor by his taking out of briefes to serve, for one may alter his purpose, while it is not compleated; nor by his assuming the titles of honour belonging to his predecessor, or exercising an honorary office hereditary in the family; for these are rights annexed to the blood, which may be used without proper representation, *Harc. (Airs) 2. Feb. 1682, L. Kilindrum*; but the exercising an office of profit which passes by voluntary conveyance, and consequently, is adjudgeable (*2. 12. 3.*) may reasonably be thought to infer a passive title. Lastly, as passive

passive titles have been introduced merely for the security of creditors, therefore, where questions concerning behaviour arise among the different orders of heirs, they are liable to one another, no further than *in valorem* of their intramissions, 20. Nov. 1630, *Pride*.

The passive title of *præceptio hæreditatis*.

41. Another passive title in heritage, may be incurred by the apparent heir's accepting of a gratuitous right from the predecessor, to any part of that estate to which he himself might have succeeded as heir; and it is called *præceptio hæreditatis*, because it is a taking of the succession by the heir, before it opens to him by the death of his predecessor. If the right be onerous, there is no passive title; but its onerosity must be proved, otherways than by the assertion of the granter in the recital: if the consideration paid for it does not amount to its full value, the defunct's creditors may reduce it in so far as it is gratuitous, upon the statute 1621; but still it infers no passive title. Tho' the right accepted of, be granted in implement of a marriage contract, it is not for that reason to be deemed onerous; for the heir of a marriage has only a right of succession, subject to the payment of the father's debts, 22. Feb. 1681, *More*.

42. The heir incurring this passive title is no further liable, than if he had, at the time of his acceptance, entered heir to the granter, and so subjected himself to the debts that were then chargeable against him: but with the posterior debts, he has nothing to do; not even with these contracted between the date of the right, and the infeftment taken upon it, Feb. 1721, *L. Aldy*; and he is therefore called
successor

successor titulo lucrativo post contractum debitum.

Not only immediate, but mediate apparent heirs, may be subjected to preception; thus, an eldest son of an eldest son incurs it, by accepting an heritable right from his grandfather; because the acceptor is, by the necessary course of law, *aliouqui successurus* to the granter, tho' not immediately: but a right granted by one brother to another, or by a father to his daughter, does not infer it, tho' the succession should at last open to the grantee; because the granter might have afterwards had issue which would succeed preferable to the grantee.

43. Neither of these passive titles takes place, unless the subject intromitted with or disposed, be such as the intrometter or receiver would succeed to as heir: hence, an heir of provision, intrometting with heirship moveables, or an heir of line intrometting with, or accepting of a right to subjects provided to special heirs, incurs no passive title. In this also the two agree that the intromission in both must be after the death of the predecessor; for there can be no *termini habiles* of a passive title, while the predecessor is alive. But, in the following respects they differ. In what these two passive titles agree.

1. *Gestio pro haerede*, being a vitious passive title founded upon a quasi delict, *viz.* intromission without the order of law, cannot be pursued against the delinquent's heir, if process has not been *litis-contestata*, while the delinquent himself was alive; whereas the *successor titulo lucrativo* is, by the acceptance of the disposition, understood to have entered into a tacit contract with the granter's creditors, by which he undertakes the burden of their debts; and all actions founded on contract. In what they differ.

tract are transmissible against heirs. 2. The right accepted by the *successor titulo lucrativo* gives him an active title, whereby process of relief is competent to him against the executors of the predecessor, for such of the moveable debts as he has paid; whereas he, who behaves as heir, not being heir *active*, has no title to pursue relief, either against the executors, or any other heir who may be liable before him, unless he has taken care to get assignation from the creditor upon payment: but this does not bar him from the benefit of discussion, which is an exception or defence, and so requires no active title.

The passive title by proposing defence against the predecessor's debt.

By not renouncing upon a charge to enter.

44. An apparent heir, who is cited by the defunct's creditor in a process for payment, if he propones any peremptory defence against the debt, incurs a passive title; for he can have no interest to object against it, but in the character of heir, 11. Feb. 1713, *Lundy*. In the same manner, the heir's not renouncing upon a charge to enter heir, infers it: but the effect of both these is limited to the special debt pursued for, or charged upon; for the deeds from which such representation is inferred, being private, can operate only in favour of the special creditor at whose instance the process or charge is raised. This passive title which is inferred from the heir's not renouncing, has no effect till decret be taken against him; and even after decret, a renunciation offered thereafter will intitle the heir to a suspension of all diligence against his person and estate for his predecessor's debts.

45. By the principles of the feudal law, an heir, when he is to make up his titles by special

cial service, must necessarily pass by his immediate predecessor, *e. g.* his father, if he was not infest; and serve heir to that predecessor who was last vest and seised in the right, and in whose *haereditas jacens* the right must remain, till a title be made up thereto from him. This bore hard upon creditors, who might think themselves secure in contracting with a person whom they saw for some time in the possession of an estate, and from thence conclude that he had made up titles to it: it is therefore provided, by 1695, *c.* 24, that every person, passing by his immediate predecessor who had been 3 years in possession, and serving heir or succeeding by adjudication on his own bond to one more remote, shall be liable for the debts and deeds of the person interjected, to the value of the estate to which he is served. This statute, being correctory of the feudal maxims, has been strictly interpreted, so as not to extend to the gratuitous deeds of the person interjected, *H.* 74; nor to the case where the interjected person was a naked fiar, and possessed only civilly through the liferenter, 25. June 1745, *Bogle*. If an heir, in place of compleating his titles by adjudging upon his own bond, or by entering to his remoter predecessor, which are the only cases expressly guarded against by the statute, shall possess the lands in the bare right of apparency, it has been found, once and again, that the penalty of the act does not reach him, 12. Feb. 1736, *Lady Ratter*,—1741, *Lord Bamsf*: but this point is still called in question, perhaps, not without some reason; for, if such a device, which is in the power of every heir, shall effectually secure

By entering to a more remote predecessor.

cure against a passive title, the intention of the statute may be utterly defeated.

Reduction
by the
heir *ex*
capite legit.

46. Our law, from its jealousy of the weakness of mankind, while under sickness, and of the importunity of friends in that conjuncture, has declared that all deeds affecting heritage, if they be granted by a person on death-bed, (*i. e.* after contracting that sickness which ends in death) in prejudice of the heir, are ineffectual, *R. M. l. 2. c. 18. §. 7. et seqq.* unless where the debts of the granter has laid him under a necessity to alienate his lands, *St. Gul. c. 13.* As this law of death-bed is founded solely on the privilege of the heir, death-bed deeds, when consented to by the heir, stand unquarrelable, *R. M. l. 2. c. 18. §. 10.* The term properly opposed to death-bed is *liege pouesty*, by which is understood a state of health; and it gets that name, because persons in health have the *legitima potestas* or lawful power of disposing of their property at pleasure.

What con-
stitutes a
death-bed
deed.

47. The two extremes being proved, of the granter's sickness immediately before signing, and of his death following it, tho' at the greatest distance of time, did, by our former law, found a presumption that the deed was granted *in lecto*, *St. 443*, which could not have been elided, but by positive evidence of the granter's reconvalescence: but now the allegation of death-bed is also excluded by his living 60 days after signing the deed, 1696, *c. 4.* The legal evidence of reconvalescence is the granter's having been, after the date of the deed, at kirk or market unsupported: for a proof of either will secure the deed from challenge, 28. *June 1671*, creditors of *Balmerino*. The going

Death-bed excluded by reconvalescence; or by living 60 days after the date.

ing to kirk or market must be performed; when people are convened in church for public service, or in the market place at the time of market, *Act. S. 29. Feb. 1692.* By the older decisions, no other proof of reconvalence was receivable, *7. Feb. 1671, Laury, — F. 25. Nov. 1687, Keiry*; but equipollent acts are, by our later practice, sustained, if they are equally pregnant, *F. 21. Feb. 1694, Tillyhaven.*

48. The privilege of reducing deeds *ex capite legit* is competent to all heirs, not to heirs of line only, but of conquest, tailzy, or provision; not only to the immediate, but to remoter heirs, as soon as the succession opens to them, tho' the deed quarrelled should not appear hurtful to the immediate heir, *H. 33.* But, where it is consented to or ratified by the immediate heir, it is secured against all challenge, even from the remoter: for such consent has the effect of a *fictio brevis manus*; the dying person is considered as disposing to the heir, and he to the stranger in whose favour the deed was really granted: yet the immediate heir cannot, by any antecedent writing, renounce his right of reduction, and thereby validate dispositions that may be afterwards granted *in legit* to his prejudice; for no private renunciation can authorise a person to act contrary to a public law, and such renunciation is presumed to be extorted through the fear of exheredation, *4. Dec. 1733, Inglis.* If the heir should not use this privilege of reduction, his creditor may, by adjudication, transfer it to himself, (2. 12. 3.) or he may, without adjudication, reduce the deed, libelling upon his interest

To what heirs is this reduction competent?

interest as creditor to the heir ; but the grant-
er's creditors have no right to the privilege,
in regard that the law of death-bed was intro-
duced, not in behalf of the granter himself, but
of his heir, *Dalr.* 24. *June* 1714, creditors of
Lindsay. He who is entered by precept of
clare constat, or by hasp and staple, has an ac-
tive title to pursue as heir, and consequently,
is intitled to this privilege.

What
rights may
be set a-
side by
this redu-
ction.

49. The law of death-bed strikes against all
dispositions of subjects to which the heir would
have succeeded, or from which he would have
had any benefit, had they not been so disposed.
Hence, the alienation, even of moveables, may
be set aside, where the heir has an interest ; as
1. Of heirship-moveables. 2. Of conquest
provided to the heir of a marriage, tho' the
subject of it should be moveable, *H.* 32. 3.
An heir may reduce the assignation of a move-
able subject, granted by his predecessor, where
the defunct's moveable estate is not sufficient
for his moveable debts ; that so the moveable
estate may be enlarged, and the heritage saved
from the diligence of personal creditors, 22.
July 1707, *Cowie*. Death-bed deeds granted
in consequence of a full or proper obligation
in liege pousty, are not subject to reduction :
but, where the antecedent obligation is merely
natural, they are reducible, *H.* 27. By stronger
reason, the defunct cannot, by a deed mere-
ly voluntary, alter the nature of his estate on
death-bed to the prejudice of his heir, so as
from heritable to make it moveable ; but, if
he should in liege pousty exclude his apparent
heir by an irrevokable deed containing reserved
faculties, the heir cannot be heard to quarrel
the

the exercise of these faculties on death-bed ; seeing he loses the character of heir by the irrevocable deed divesting the disposer, and so has no interest to reduce any posterior deed.

50. The proper method for affecting a defunct's heritable estate, either for his own debt or for that of his heir, has been already explained. 2. 12. 5. In a competition between the creditors of the defunct and of the heir, the Roman law, *l. i. §. i. de separat.* ; and, after their example, ours, 1661, *c. 24*, has justly preferred the creditors of the defunct, as every man's estate ought to be liable, in the first place, for his own debt. But this preference is, by the above quoted statute, limited to the case where the defunct's creditors have done diligence against their debtor's estate, within three years from his death ; so that the creditors of the heir have it in their power, after that period, to affect it for their own payment. By a subsequent branch of this act, all dispositions of the predecessor's estate by an heir, within a year after the succession opens to him, are null, in so far as they are hurtful to the creditors of the predecessor. This takes place, tho' these creditors should have used no diligence, *F. v. i. 219* ; and even where the dispositions are granted after the year, they seem, by the first part of the act, to be ineffectual against the defunct's creditors who have done diligence within the three years. This statute, tho' its enacting words seem to relate only to heritage, has been found to extend also to the defunct's moveable estate, 9. Feb. 1711, *Graham*.

Competition between the creditors of the defunct and of the heir.

TIT. 9. *Of Succession in Moveables.*

THE legal heirs or successors in moveables are the same as in heritage, with these exceptions; that in the succession of moveables, males do not exclude females, nor the elder son the younger: nor is there in this succession, any right of representation, by which remoter heirs succeed in the place of the more immediate ones: so that it is an universal rule, that the next in degree to the defunct at the time of his death, who is called nearest of kin, succeeds to his moveable estate; and if there are two or more equally near, all of them, without distinction of sex or of age, succeed by equal parts. Where the estate of a defunct consists, partly of heritage, and partly of moveables, he who is heir at law in the heritage, has no share of the moveables, if there are others as near in degree to the defunct as himself: but where the heir, in such case, finds it his interest to renounce his exclusive claim to the heritage, and betake himself to his right as one of the nearest of kin, he may collate or communicate the heritage with the others, who, in that case, must collate the moveable estate with him; so that the whole is thrown into one mass, and divided *in capita*, among all of them. This doctrine takes place, not only in the line of descendants, but of collaterals, 1743. *Chancellor.*

Rules of
moveable
succession
by law.

Collation
by the
heir.

Succession
in move-
ables by
destinati-
on.

2. One may settle his moveable estate upon whom he pleases, excluding the legal successor, by a testament; which is a written declaration,

ration, of what a person wills to be done with his moveable estate after his death. No testamentary deed is effectual, till the death of the testator, who may therefore revoke it at pleasure, or make a new one, by which the first loses its force; and hence, testaments are called, last or latter wills. Testaments, in their strict acceptation, must contain a nomination of executors, *i. e.* of persons appointed to administer the succession according to the will of the defunct: but this does not hinder a settlement of moveables, in favour of an universal legatary to be valid, tho' the granter should not have appointed executors; and on the other hand, a testament, where executors are appointed, is valid, tho' the person who is to have the right of succession should not be named. In this last case, if the executor nominated be a stranger, *i. e.* one who has no legal interest in the defunct's moveable estate, he is merely a trustee, accountable to the nearest of kin; but he may retain a third of the dead's part, (explained *infr.* §. 6.) for his trouble in executing the testament, in payment of which, any legacy that is left to him must be imputed, 1617. c. 14. The heir, if he is named executor, has right to the third as a stranger: but if one is named, who has interest in the executory, he has no allowance, unless such interest be less than a third. Nuncupative or verbal testaments are not, by the law of Scotland, effectual for supporting the nomination of an executor, let the subject of the succession be ever so small: but verbal legacies, not exceeding *L.* 100. *Scots*, are sustained; and even where they are granted for more, they are

Testament.

Executors.

A stranger named executor, is accountable to the nearest of kin.

Nuncupative testament.

ineffectual only as to the excess. 7. July, 1629. *Wallace*.

Legacy

Not due
till the
granter's
death.

*Legatum
rei alienae.*

Legacy of
an herita-
ble bond.

3. A legacy is a donation by the defunct, preftable by the executor to the legatee. It may be granted, either in the testament or in a separate writing. Legacies are not due till the granter's death, and consequently they can transmit no right to the executors of the legatee, in the event that the granter survives him. By the *Roman* law, if one bequeathed a subject, knowing that it was not his own, the heir behoved, either to purchase it for the legatee, or to pay him the value; for, otherwise, the legacy could have no effect. Where the testator erroneously imagined the subject to belong to himself, which is, *in dubio*, to be presumed, neither the thing itself nor its value could be claimed; because it was not to be supposed he would have burdened his heir, if he had known the subject had belonged to another. §. 4. *Inst. de legat.* This obtains also with us, in legacies of moveable subjects: but as, by the law of *Scotland*, heritage cannot be bequeathed by testament, the testamentary conveyance or bequest of an heritable bond due to the testator, infers no obligation on the executor, to make up the value to the legatee out of the moveables, 26. Nov. 1674. *Paton*; because, whatever the defunct's intention might have been, he took an inhabile method of executing it. But, if the heir be named executor, such legacy is effectual; for the heir cannot approbate and reprobate the same deed; he cannot quarrel the legacy with which he is burdened by the defunct, and at the same time take the benefit of the testament, 2. Dec, 1674. *Cranston*. Where a moveable

moveable bond is bequeathed, for which the testator has afterwards taken an heritable security, his altering the nature of the subject, imports a revocation of the legacy, 8, *July 1673. Edmonston.*

4. Legacies, where they are general, *i. e.* ^{General} of a certain sum of money indefinitely, give ^{legacy.} the legatee no right in any one debt or subject; he can only insist in a personal action against the executor, for payment out of the defunct's effects. A special legacy, that is, ^{Specialle-} of a particular debt due to the defunct, or of ^{gacy con-} a particular subject belonging to him, is of ^{fers a jus} the nature of an assignation, by which the property of the special debt or subject vests, upon the testator's death, in the legatee, who can therefore directly pursue the debtor or possessor: yet, as no legacy can be claimed till the debts are paid, the executor must be called in such process, that it may be known, whether there are free effects sufficient for answering the legacy. Where there is not enough for payment of all the legacies, each of the ^{And is not} general legatees must suffer a proportional ^{subject to} abatement; but a special legatee gets his le- ^{abate-} gacy entire, tho' there should be nothing over, ^{ment, tho'} for payment of the rest; and on the contrary, ^{there} he has no claim, if the debt or subject be- ^{should not} queathed should perish, whatever the extent of ^{be enough} the free executory may be. ^{for the o-} ^{ther lega-} ^{taries.}

5. Minors after puberty can test without ^{Who can} their curators, wives without their husbands, ^{test.} and persons interdicted without their interditors: but bastards cannot test, except in the cases afterwards set furth, 3. 10. 3. As a certain share of the goods, falling under the communion

One cannot test in prejudice of the *jure relictae* or legitime.

communion that is consequent on marriage, belongs, upon the husband's decease, to his widow *jure relictae*, and a certain share to the children, called the legitime, portion natural, or bairns part of gear; one who has a wife or children, tho' he be absolute administrator of all these goods during his life, and consequently, may alienate them, by a deed *inter vivos* in *liege pousty*, even gratuitously, if no fraudulent intention to disappoint the wife or children shall appear, (1. 6. 7.) cannot impair their shares gratuitously on death-bed, see *Dirlet. Doubts. V. legitima liberorum*; nor can he dispose of any part thereof by a deed in its nature testamentary, seeing testaments do not operate till the death of the testator, at which period, the division of the goods falling under communion have their full effect in favour of the widow and children.

Division of a testament in case of a widow or children.

6. If a defunct leaves a widow, but no child, his testament, or in other words the goods in communion, divide in two; one half goes to the widow, the other is the dead's part, *i. e.* the absolute property of the deceased, on which he can test, and which falls to his nearest of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one half as their legitime; the other half is the dead's part, which falls also to the children as nearest of kin in the way of succession. If he leaves both widow and children, the division is tripartite; the wife takes one third by herself, another falls to the children equally among them, or even to an only child, tho he should succeed to the heritage, 21. *Jan. 1681, Trotter*; the remaining third is the

the dead's part. Where the wife predeceases In case of the wife's predecease. without children, one half is retained by the husband, the other falls to her nearest of kin. Where she leaves both husband and children, no legitime is presently exigible by the children; for the right arising to them from the dissolution of the marriage, continues under the father's power during his life; the husband therefore retains one third in his own right, another in virtue of his childrens claim of legitime; the rest, being the wife's share, goes to her children, whether of that or of any former marriage, as her next of kin.

7. Before a testament can be divided, the What debts affect the whole executory. debts owing by the defunct are to be deducted; for all executory must be free. As the husband has the full power of burdening the goods in communion, his debts affect the whole, and do lessen the legitime and the share of the relict, as well as the dead's part. His funeral charges, and the mournings and aliment due to the widow, are considered as his proper debts, 20.

June 1713, Moncrieff; but the legacies, or And what affect only the dead's part. other gratuitous rights, granted by him on death-bed, affect only the dead's part. Bonds bearing annual rent due by the defunct cannot diminish the relict's share, because such bonds, when due to the defunct, do not increase it, 1661, c. 32. The funeral charges of the wife predeceasing, fall wholly on her executors who have right to her share. Where the defunct leaves no family, neither husband, wife nor child, the testament suffers no division, but all is dead's part.

8. The whole issue of the husband, not only by that marriage which was dissolved by his death, What children are intitled to the legitime.

death, but by any former marriage, has an equal interest in the legitime; otherways, these of the former marriage would be quite cut out, as they could not claim the legitime during their father's life. But no legitime is due, 1. Upon the death of a mother. 2. Neither is it due to grandchildren upon the death of a grandfather; perhaps, because the immediate father is presumed to have already received his just share out of the defunct's effects. Nor 3. to children foris-familiated, *i. e.* to such as, by having renounced the legitime, are no longer considered as bairns of the family, and so are excluded from any further share of the defunct's moveables than they have already received.

Renunci-
ation of
the legi-
time, how
inferred.

9. As the right of legitime is strongly founded in nature, the renunciation of it is not to be inferred by implication; neither by the child's carrying on an employment by himself, nor by his marriage, nor even by his accepting a provision from his father, unless it specially bear to be in satisfaction of the legitime. Renunciation by a child, of his claim of legitime, has the same effect as his death, in favour of the other children intitled thereto, and consequently the share of the renouncer divides among the rest; but he does not thereby lose his right to the dead's part, if he does not also renounce all he could have claimed by the death of his father. Nay, his renunciation of the legitime, where he is the only younger child, has the effect to convert the whole subject thereof into dead's part, which will therefore fall to the renouncer himself as nearest

est of kin, if the heir is not willing to collate the heritage with him, *F. v. 2. 62.*

10. For preserving an equality among all the children who continue intitled to the legitime, we have adopted the *Roman* doctrine of *collatio bonorum*; whereby the child, who has got a provision from his father, is obliged to collate it with the others, and impute it towards his own share of the legitime, unless it contain a special clause, that the receiver shall continue as a bairn in the house; for, where there is such a clause, the provision is justly interpreted to be granted as a *praecipuum*, without the necessity of collation, 18. Nov. 1737, *Beg.* A child is not obliged to collate an heritable subject provided to him, because the legitime is not impaired by such provision, 14. Feb. 1677, *D. Buccleugh.* As this collation takes place only in questions among these who are intitled to the legitime, the relict is not obliged to collate donations given her by her husband, in order to increase the legitime; and, on the other part, the children are not obliged to collate their provisions, in order to increase her share.

Collation among the younger children.

In what cases excluded.

11. As an heir in heritage must make up his titles by entry, so an executor is not vested in the right of the defunct's moveable estate, without confirmation; which, therefore, is called, by some lawyers, tho' improperly, the *aditio haereditatis in mobilibus*. Confirmation is a sentence of the Commissary or Bishop's court, empowering an executor, one or more, upon making inventory of the defunct's moveables, to recover, possess, and administrate them, either in behalf of themselves or of others interested therein.

Confirmation.

Quot of
testaments

Before
what com-
missariot
must the
testament
be con-
firmed.

Form of
confirma-
tion.

Confirma-
tion of a
testament
testamen-
tary.

therein. The Bishop was, in all confirmations, intitled to the 20th part of the defunct's moveables, called the quot of the testament which was antiently computed, without deduction of debts. Quots were first discharged during the usurpation, by 1641, c. 61, which act was revived by 1661, c. 28: they were soon thereafter restored, 1669, c. 19, with this restriction, that they should be paid out of the free gear, *deductis debitis*; and now they are again discharged, 1701, c. 14., without prejudice to the dues of court payable at confirmation. Testaments must be confirmed in the commissariot where the defunct had his principal dwelling house at his death, 7. Feb. 1672. Commiss. of *Edinburgh*,—*Mill.* 57. If he had no fixed residence, or died in a foreign country, the confirmation must be at *Edinburgh*, as the *commune forum*; but, if he went abroad with an intention to return, the commissariot within which he resided before he left *Scotland*, is the only proper court, 1426, c. 89.

12. Confirmation proceeds upon an edict, which is affixed on the door of the parish church where the defunct dwelt, and serves to intimate to all concerned, the day of confirmation, which must be 9 days at least after publishing the edict. In a competition for the office of executor, the Commissary prefers, *primo loco*, the person named to it by the defunct himself, whose nomination he ratifies or confirms, without any previous decerniture: this is called the confirmation of a testamentary. In default of an executor nominate, the nearest of kin is preferred, next the relict, then creditors, and lastly, legatees. All of these must be

be decerned executors, by a sentence called a *decreet dative*; and, if afterwards they incline to confirm, the Commissary authorises them to administrate, upon their making inventory, and finding security to make the subject thereof furthcoming to all having interest: which is called the confirmation of a testament dative.

Of a testament dative.

13. Executors were, by our antient practice, obliged to confirm the whole moveable estate of the defunct, and for that end behoved to give up the inventory on oath, *Cr. 34.—H. Min. Pr. p. 25*; and, if any new subject came afterwards to their knowledge, they were allowed to add it to the principal testament: but now the Commissaries admit whatever inventories are offered. Where no person applied for the office, the Bishop, that he might be secured of his quot, could, by our former practice, charge all having interest to confirm, upon general letters of horning; and, if there was no compearance, he preferred to the office his own procurator fiscal, who was thereby intitled to the whole dead's part, till one having an interest claimed the office, who was of course decerned executor surrogate, *i. e.* executor in place of the fiscal: but these general letters are discharged, by 1690, *c. 26*.

Confirmation must be upon inventory.

General letters charging to confirm are now discharged.

14. A creditor, whose debtor's testament is already confirmed, may sue the executor, who holds the office for all concerned, to make payment of his debt. Where there is no confirmation, he himself may apply for the office, and confirm as executor-creditor; which intitles him to pursue for, and uplift the subject confirmed, for his own payment: and, where

The creditor of a defunct may cite the executor.

Or confirm in his own name as executor-creditor.

Confirma-
tion with-
in six
months
founds a
prefe-
rence.

one applies for a confirmation as executor creditor, every co-creditor may apply to be conjoined with him in the office. As this kind of confirmation is simply a form of diligence, creditors are, by *Act. S. 14. Nov. 1679*, exempted from the necessity of confirming more than the amount of their debts. That one creditor may not be excluded by the nimious diligence of another, it is declared, by *Act. S. 28. Feb. 1662*, that whoever either obtains himself confirmed, or cites the executor already confirmed, within six months after the defunct's death, shall be preferred *pari passu* with those who had done more timely diligence. In a competition between diligences used after the six months, the preference was formerly governed by the priority of the citations, *July 1723, Sir Ja. Gray*: but, by the later practice, citation without decret, founds no preference on the executory goods, *15. Feb. 1738, Grame*.

A credi-
tor whose
debt is not
constitu-
ted may
charge the
nearest of
kin to con-
firm.

15. One whose debt has not been constituted, or his claim closed by decret, during the life of the defunct debtor, has no title to demand directly the office of executor *qua* creditor; but he may charge the nearest of kin who stands off, to confirm, who must either renounce within 20 days after the charge, or be liable to the debt: and, if the nearest of kin renounces, the pursuer may constitute his debt, and obtain a decret *cognitionis causa* against the *haereditas jacens* of the moveables, upon which he may confirm as executor-creditor to the defunct, *1695, c. 41*; but the method chalked out by this statute has been seldom or never put in practice. Where one is creditor, not

not to the defunct, but to his nearest of kin who stands off from confirming, he may, by the same statute, affect the defunct's moveables, either by requiring the procurator fiscal to confirm and assign to him, or by obtaining himself decerned executor dative to the defunct, as if he were creditor to him, and not to his nearest of kin.

A creditor to the nearest of kin; how he may recover his debt out of the defunct's executory.

16. Where an executor has either omitted to give up any of the defunct's effects in inventory, or has estimated them below their just value, there is place for a new confirmation on *ad omiffa, vel malè appretiata*, at the suit of any having interest. The estimate put on the executory goods by the defunct himself, however low, must stand good as to the dead's part, over which he has full power. In this confirmation, the executor in the principal testament must be cited, because it has the effect to exclude him from a part of the administration to which his office intitles him; and, if it appears that he has not omitted or undervalued any subject *dolosè*, the Commissary, in place of naming a new executor, will ordain the subjects omitted, or the difference between the estimations in the principal testament and the true values, to be added thereto: but, if dole shall be presumed from circumstances, the whole subject of the testament *ad omiffa vel malè appretiata*, will be carried to him who confirms it, to the exclusion of the executor in the principal testament.

In this sort of confirmation, the first executor must be cited.

17. Executory, being an office, is not descendible to heirs: where therefore there is but one executor, the office dies with himself; if there are two, or more, it accresces to the

Executory is not descendible to heirs.

Executors
ad non ex-
ecuta.

the survivors. Where all the executors happened to die, while any part of the testament remained not executed, *i. e.* before they had obtained possession, payment, decret or new security for the debts in their own name, an executor might, by our former practice, have been named *ad non executi*; but, for near a century, confirmations, *ad non executi*, have been seldom used: for, where-ever a testament is confirmed for the executor's own behoof, *e. g.* by the nearest of kin, or by an executor-creditor for the payment of his own debt, such confirmation is adjudged to have the effect of an assignation, or procuratory *in rem suam*; whereby the full right of the subjects confirmed, and consequently, the right of execution, transmits to the representatives of the person confirming, 12. Feb. 1662, Bell,—24. June 1737, Mitchel.

Legitime
and relict's
part trans-
mit with-
out confir-
mation.

The dead's
part does
not.

18. The legitime and relict's share, because they are rights arising *ex lege*, in consequence of the communion of goods, and of the natural obligation upon fathers, to give a certain portion of their estates to their issue, operate *ipso jure* upon the father's death, in favour of the relict and children; and consequently transmit from them, tho' they should die before confirmation, to their nearest of kin: whereas the dead's part, which falls to the children or other nearest of kin in the way of succession, remains, if they should die before confirming, *in bonis* of the first defunct; and so does not descend to their nearest of kin, but may be confirmed by the person who, at the time of confirmation, is the nearest of kin to the first defunct. Special assignations, tho' neither

neither intimated nor made public during the life of the granter, carry to the assignee the full right of the subjects assigned, without confirmation, 1690, c. 26. Special legacies are really assignations, and so fall under the act, Jan. 1729, Gordon.—The nearest of kin, by the bare possession of the *ipsa corpora* of moveables, acquires the property thereof without confirmation, and transmits it to his executors, 14. Nov. 1744, Macwibirter.

Special assignations and legacies need not be confirmed. Possession of moveables is equivalent to confirmation.

19. The confirmation of any one subject by the nearest of kin, as it proves his right of blood, has been, by our later decisions, adjudged to carry the whole executory out of the defunct's testament, even what was omitted, and to transmit all to his own executors, 23. Jan, 1745. Executors of Murray. The confirmation of a stranger, who is executor nominate, as it is merely a trust for the nearest of kin, has the effect to establish the nearest of kin's right to the subjects confirmed, in the same manner as if himself had confirmed them.

Partial confirmation of the nearest of kin transmits the whole.

An executor decerned, who is not willing to put himself to the expence of confirming uncertain debts, may, even before confirmation, pursue the defunct's debtors, if he gets a licence from the Commissary for that purpose: but such licences, being intended only for saving expences, where there is a danger of getting nothing, are granted *excludendo sententiam*, and therefore, if the executor shall, before confirmation, take decret for the debt, the decret is null. Diligence pursued upon a licence falls, if the executor should die before confirmation; since the licence is a personal permission,

Licence to pursue before confirmation,

permission, which dies with the person licensed, 30. June 1705, Jackson.

Executors
hold the
office *pro*
indiviso.

20. Where there are two or more executors, they hold the office *pro indiviso*, or as one person: all of them must therefore concur, in pursuing the defunct's debtors, 8. March 1634, —*contra L. Lag*: and if any one shall refuse, he may be excluded from the office, at

After exe-
cution, the
subjects
divide a-
mong
them.

the suit of the co-executors: but after a debt comes to be established in their person by decree, each executor may, by himself, pursue for his particular share thereof; and the debtor may safely make payment to him of such share, 17. March 1630, *Semple*. Yet a debtor to the executory, ought not to make payment of any part of his debt to an *executor-creditor*, without concurrence of the other executors; because the right of an executor-creditor depends entirely on the validity of his debt, which the co-executors have an interest to enquire into, before payment, 7. Nov. 1738,

Co-execu-
tors are li-
able only
pro rata.

Inglis. As all the co-executors have an equal right in debts due to the defunct, they are liable only *pro rata* in debts due by him, unless it shall appear, that he who is pursued, has by himself intromitted with as much of the executory effects, as the debt pursued for amounts to, 22. July 1630, *Salmon*.

Executors
are not li-
able *ultra*
wires in-
ventarii.

21. Executory, tho' it be sometimes said to carry a certain degree of representation of the defunct, is properly an office: executors therefore are not subjected to the defunct's debts, beyond the value of the inventory; but at the same time, they are liable in diligence, for making the inventory effectual to all having interest. A decret and registred horning, is held

Diligence
prestable
by execu-
tors.

held to be sufficient diligence against debtors. An executor creditor, who confirms more than his debt amounts to, is liable in diligence for what he confirms; *See Act S. 14. Nov. 1679.*

Executors are not liable in annualrent, even for these bonds that carried annualrent to the defunct, after payment thereof to them by the debtors, 23. Jan. 1747, *E. Roseberry*; because their office obliges them to hold in their hands the sums they have made effectual, in order to a distribution thereof among all having interest. And on the same principle, tho' an executor should put the executory money, after it is in his hands, to interest, he is not liable in interest; for as, by his office he ought to have retained it, he lends on his own risk, and consequently is intitled to the whole profits, *July 1730, creditors of Thomson.*

Executors
how far
liable for
interest.

22. Seeing executors are trustees for others, in as far as others have an interest, they cannot, even after the defunct's debts are established in their own person, assign them to the prejudice of these concerned: nor can the executory goods fall under the executor's escheat, further than the executor's proper interest reaches, 21. Dec. 1671, *Gordon*. On the same ground, creditors of a defunct may affect by diligence, not only the original subjects confirmed in the testament, but even bonds taken payable to the executor himself, if they were granted as the value of executory goods; and they are preferable to the executor's own creditors, upon all the subjects of the executory, 16. Dec. 1674, *L. Kilbead*: for this reason also, an executor must communicate to all having interest in the executory, the benefit of the cases

Executors
are tru-
stees for
all having
interest.

cases got in transacting the debts acquired by him after confirmation, from which period he became their common trustee, 4. *June 1747; Mackenzie.*

In what
cases may
executors
pay with-
out sen-
tence.

23. But as executors are judicial trustees, they cannot make payment, even to the creditors of the defunct, without a sentence authorising them: and if, before actual payment, made in consequence of a sentence obtained by one creditor, another should interpell the executor by citation, he cannot pay the first, till both are brought into the field, See 16. *Dec. 1629, White.* Neither can he pay any creditor even upon sentence, in prejudice of the debts acknowledged by the defunct in his testament; for such acknowledgment contained in the executor's own title, is a sufficient interpellation. An executor may, without decret, pay, 1. The debts called privileged, even after citation. In this class are reckoned, medicaments furnished to the defunct on death-bed, physician's fees, funeral charges, under which are comprehended, mournings for the children of the deceased, and whatever is necessary for the decent performance of the funerals. *Mill. 57;* the rent of the house where the defunct died, and his servant's wages, either for a year or half a year current at his death, according to the time for which the house was rented, or the servants engaged. These, being necessary debts, have the preference before all others. 2. The executor, where he himself was creditor to the defunct, is, without decret, intitled to retain the executory effects for his own payment; for one cannot obtain decret against himself. 3. He may make payment, without decret,

decreet, to creditors, whose debts are acknowledged in the testament, if before payment he be not interpellated by another creditor, 31. *March 1624, L. Currybill.*

24. Debts due by a defunct are preferable upon the subject of his testament, to these due by the nearest of kin, 1695, c. 41. All debts neither privileged, nor due to the executor himself, are preferable *pari passu* upon what remains *in medio*; but the creditors therein, if they are not testamentary, have no claim, in so far as the funds are already exhausted, by payments made upon sentences prior to the citation at their own instance. As to competitions among creditors of a defunct, see farther, *supr.* §. 14. The creditors of the deceased cannot prove their debts by the oath of the executor, further than his own interest extends; for, as to the shares belonging to the relict, children, &c. he is only a trustee. Legataries, whose right is merely gratuitous, are ranked in the last place. The expence of confirmation and other necessary disbursements in the common management, come off the whole head of the executory. Executors who have applied the whole inventory, according to the rules above set forth, if they be pursued by a creditor of the defunct, may plead by way of exception, that the inventory is exhausted. If there are any debts due to the defunct, which the executor has not been able to make effectual, he will be exonerated as to these, upon his producing decreets and registred hornings, and granting assignments thereof to the defunct's creditors, according to their preference.

Rules of
preference
among the
defunct's
creditors.

Exonera-
tion of ex-
ecutors.

Passive title of vitious intromission.

Against whom it strikes.

From what acts it is inferred.

Presumed vitious intromission introduced by act of *sederunt*.

In what cases vitious intromission is excluded.

25. The only passive title in moveables is vitious intromission, which may be defined, an unwarrantable intermeddling with the moveable estate of a defunct, without the order of law. This is not confined, as the passive titles in heritage are, to the persons interested in the succession, but strikes indiscriminately against all intromettors; because even strangers, when attending on dying persons, have frequent opportunities of intermeddling with moveables, which are more easily abstracted than heritage. The bare intermeddling infers the passive title, tho' the thing intrometted with should not be applied to any use by the intromettor, 29. *June 1705, Archibald*. Where an executor confirmed intromets with more than he has confirmed, such superintromission infers a passive title; fraud being presumed, from the not giving up of the subject intrometted with in inventory, 13. *Dec. 1709, Drummond*: yet this presumption may be excluded by special circumstances. Vitious intromission is presumed by *Act S. 23. Feb. 1692*, in the special case where the repositories of a dying person are not sealed up, as soon as he becomes incapable of sense, by his nearest relations; or, if he dies in a house not his own, by the master or mistress of such house, and the keys by them delivered to the Judge ordinary, to be kept by him, for the benefit of all having interest.

26. The passive title of vitious intromission, takes no place, 1. Where the subject intermeddled with, was truly no part of the defunct's estate, or ceased to be such before the intromission; *e. g.* where the goods of one who died at the horn are vested in a donatary; or where there

there is an executor confirmed: for in these cases, the intrometor is only accountable to the donatary or executor, whose goods they are by the declarator or confirmation. But by special statute, 1696, c. 20, the confirmation of an executor-creditor, because it is no more than a step of diligence, does not screen an intrometor from the passive title; unless he claims under the creditor confirmed: and even tho' he has no right from the creditor, he seems to be secured by the last words of the act, if his intromission has been with the special subject confirmed. 2. It is excluded by any colourable title, or by any circumstance that takes off the presumption of fraud, *e. g.* by a general disposition of moveables, tho' that is of itself an incomplete right without confirmation, 12 July 1666, *Scot*; or by a title of sale, tho' the subject sold had truly belonged to the defunct, and not to the seller; or by the small value of the thing intromitted with, 22. Jan. 1713, *Stark*. In consequence of this rule, necessary intromission, or *custodiae causa*, by the wife or children, who only continue the defunct's possession, in order to preserve his goods for the benefit of all concerned, infers no passive title.

27. Upon the same principle, an intrometor, by confirming himself executor, and thereby subjecting himself to account, before action be brought against him on the passive titles, purges the vitiosity of his prior intromission: and where the intrometor is one who is interested in the succession, *e. g.* a relict or nearest of kin, his confirmation, at any time within a year from the defunct's death, will
exclude

exclude the passive title, notwithstanding a prior citation, 13, Dec. 1709, *Drummond*. As this passive title was introduced only for the security of creditors, it cannot be pursued by legatees: and since it is of the nature of a delict, it cannot be pleaded against the heir of the intromettor. (4. i. 22.) As in delicts, any one of many delinquents may be subjected to the whole punishment, so any one of many intromettors may be conveyed in *solidum* for the pursuer's debt, without calling the rest; and he who pays, has no relief against his fellow delinquents, being destitute of an active title. (3. 8. 43.) If they are jointly pursued, they are liable, not *pro rata* of their several intromissions, but *pro virili*. 16. Nov. 1626, *Chalmers*.

Vicious intromettors have no relief against each other,

Mutual relief betwixt the heir and executor.

28. The whole of a debtor's estate is subjected to the payment of his debts; and therefore, both his heirs and executors are liable for them, in a question with creditors: but as the defunct's succession is by law divided into the heritable and the moveable estate, each of these ought, in a question between the several successors, to bear the burdens which naturally affect it. Action of relief is accordingly given by 1503. c. 76, to the heir who has paid a moveable debt, against the executor; and tho' the statute enacts nothing concerning a relief to the executor against the heir for heritable debts, practice has, *ex paritate rationis*, extended it to that case, 7. March 1629, *Falconer*. This relief is not cut off, by the defunct's having disposed, either his land estate or his moveables, with the burden of his whole

whole debts: for such burden is not to be construed as an alteration of the rights of succession, but merely as a further security to creditors, 23. Jan. 1745, *Russel.* — F. v. i. 185, unless the contrary shall be presumed from the special stile of the disposition.

TIT. 10. *Of last Heirs and Bastards.*

BY the first rules of the feudal law, feudal grants taken to the vassal and to a special order of heirs, without settling the last termination upon *heirs whatsoever*, returned to the superiour, upon failure of the special heirs therein contained: but now, that feus are become patrimonial rights, the superiour is, by the general opinion of lawyers, held to be fully divested by such grant, and the right descends to the vassal's heirs at law. And even where a vassal dies, without leaving any heir who can prove the remotest propinquity to him, it is not the superiour, as the old law stood, *Cr. 351*, but the King, who succeeds as last heir, both in the heritable and moveable estate of the defunct, in consequence of the rule formerly mentioned, *quod nullius est, cedit domino Regi.* (2. 1. 4. 5.)

Where a vassal dies without heirs, the King succeeds as *ultimus haeres.*

2. If the lands, to which the King succeeds, are holden immediately of himself, the property is consolidated with the superiority, as if resignation had been made in the Sovereign's hands. If they are holden of a subject, the King, who cannot be vassal to his own subject,

names

Where the lands hold of a subject, the King names a donatary.

Who is offered to the superiour by letters of presentation.

The King is liable in *valorem* of the estate.

The King succeeds as *ultimus haeres* to bastards

Who therefore cannot alienate in *lectio*.

Bastards who have no lawful children cannot test.

names a donatary, who, to compleat his title, must obtain decret of declarator, in which a general citation against all and fundry is sufficient, 31. *July* 1666, *Craufurd*; and thereafter he is presented to the superiour, by letters of presentation from the King under the quarter-seal, in which the superiour is charged to enter him to the lands, with all the rights competent to the former vassal. The whole estate of the deceased is, in this case, subjected to his debts, and to the widow's legal provisions, 7. *July* 1629, *Wallace*; and may therefore be affected, either by the adjudication or confirmation of creditors, according to the nature of the right: but, in the carrying on of such diligence, the officers of state and the donatary must be called as parties. Neither the King nor his donatary is liable beyond the value of the succession.

3. A bastard can have no legal heirs, except these of his own body, since there is no succession but by the father, and a bastard has no certain father. The King therefore succeeds to him, failing his lawful issue, as last heir. Tho' the bastard, while he is in *liege pousty*, is absolute proprietor of his estate, and may therefore settle his heritage upon whom he pleases by entail, he cannot alienate it *in lecto*, in prejudice of the King, who can reduce such deed in the character of *ultimus haeres*. Nay, a bastard is disabled, *ex defectu natalium*, from disposing even of his moveables by testament without letters of legitimation from the Sovereign, 18. *June* 1678, Commissioners of *Berwick-shire*: which letters, however ample they may be, imply, in the general opinion of lawyers, no more than a power of testing; but cannot

cannot enable the bastard to succeed in prejudice of lawful heirs; for it is the law only that can declare an heir. If the bastard has lawful children, he may test, and name tutors and curators to them, 8. *March* 1628, *Muir*; for, in such case, the King can have no interest in his estate, the bastard's children being his lawful heirs.

4. The legal rights of succession, being founded in marriage, can be claimed only by these who are born in lawful marriage; the issue therefore of an unlawful marriage is incapable of succession. Marriage entered into after divorce for adultery, between the persons guilty, is declared unlawful, and their issue incapable of succeeding, by 1600, c. 20. A bastard is not only excluded, 1. From his father's succession, because law knows no father, who is not marked out by marriage; and 2. From heritable succession, because he cannot be pronounced lawful heir by the inquest in terms of the brief; but also, 3. From the moveable succession of his mother; for, tho' the mother be known, the bastard is not her lawful child, and legitimacy is implied in all succession deferred by law: and, if a bastard might be decerned nearest of kin to his mother, he would, by necessary consequence, be intitled to an equal share of her moveable succession with any of her lawful children. A bastard, tho' he cannot succeed *jure sanguinis*, may succeed by destination, where he is specially called to the succession, by an entail or testament.

Impediments to succession

Bastards incapable of legal succession.

But not of succession by destination.

5. Certain persons, tho' born in lawful marriage, are declared incapable of succession by statute.

Excom-
munica-
ted per-
sons, how
far anti-
ently in-
capable of
succession.
Aliens
cannot suc-
ceed in
feudal
rights.

Nor Pa-
pists, un-
less they
renounce
Popery.

statute. The director of the chancery, was, by 1609, c. 4, discharged from issuing precepts on retour, in favour of persons excommunicated; and subject-superiours were left at liberty to refuse briefs and precepts of *clare constat* in their favours; but these penalties are now taken off, by 1690, c. 28. Aliens are, from their allegiance to a foreign Prince, incapable of succeeding in feudal rights, without naturalization, *F. v.* 2. 66; see 1558, c. 65, 66. 1669, c. 7. That part of these statutes which supposes them also incapable of moveable succession, tho' it obtains, at this day, in some other countries, is not in force with us. One born in a foreign state, of *British* protestant parents, is not an alien in the judgment of law, see 10mo *An. c.* 4. Persons educated in or professing the Popish religion, if they shall neglect, upon their attaining the age of 15 years, to renounce its doctrines by a signed declaration, cannot succeed in heritage; but must give place to the next Protestant heir, who will hold the estate irredeemably, if the Popish heir does not, within ten years after incurring the irritancy, sign the *formula* prescribed by the statute 1700, c. 3.

BOOK IV.

BOOK IV.

TIT. I. Of Actions.

HITHERTO of *persons* and *things*, the two Actions. first objects of law: *actions* are its third object, whereby persons make their rights effectual. An action may be defined, a demand regularly made and insisted in, before the judge competent, for the attaining or recovering of a right: and it suffers several divisions, according to the different natures of the rights pursued upon.

2. Actions are either real or personal. A Real and real action is that which arises from a right in personal. the thing itself, and which therefore may be directed against all possessors of that thing: thus, an action for the recovery even of a moveable subject, when founded on a *jus in re*, is in the proper acceptation real; but real actions are in vulgar speech confined to such as arise from heritable subjects. A personal action is founded, only on an obligation undertaken for the performance of some fact or the delivery of some subject; and therefore can be pursued against no other than the person obliged, or his heirs. Both rights are included in an investment of annualrent, which contains not only a personal obligation on the grantor to pay, but a right of hypothec in the subject itself; and therefore the creditor can either pursue the grantor or his representatives in a per-

sonal action; or he may, for his payment, insist in a real action, against the tenants or other possessors of the subject affected, tho' they should not represent the granter.

Poynding
of the
ground,

3. Poynding of the ground, tho' it be properly a diligence or an execution, is generally considered by lawyers, as a species of real actions; and is so called, to distinguish it from personal poynding, which is founded on an obligation merely personal. Every *debitum fundi*, whether legal or conventional, is a foundation for this action. It is therefore competent to an annualrenter, for the annualrents due upon his right; to a superior, for his feu-duties or for his non-entry-duties before declarator, according to the distinction laid down, 2. 5. 19; and in general, to all creditors in debts which make a real burden on lands. As it proceeds on a real right, it may be directed against all goods that can be found on the lands burdened, even tho' the original debtor should be divested of the property in favour of a singular successor: but, 1. goods brought upon the ground by strangers are not subject to this diligence, 6. Feb. 1679, *Collet.* 2. Even the goods of a tenant cannot be poynded for more than his term's rent, by 1469, c. 37, i. e. as practice has explained it, for more than the tenant was *de facto* due to his master of bygone rents, at the time of poynding. see *Gosford* 14. July 1676, L. Powrie.

4. In a poynding of the ground, not only the natural possessors must be called, but the proprietor of the ground, who has an obvious interest in the issue of the cause: where therefore the action is brought against lands that are granted

granted in wadset, the wadsetter must be cited who is really the proprietor, and not the reverfer who has the bare right of redemption. The defenders called in this action, are called, not as debtors to the pursuer, but as proprietors or possessors of the lands affected; because, the process being founded on a real right, affects the lands themselves. A decret therefore, when it is once obtained upon it, operates against all singular successors in the lands, without any new sentence, 26. *June 1662, Adamson*: whereas in personal poynding, the goods are not poynded, as being on the ground of any special lands, but as the goods of the pursuer's debtor; and therefore the warrant cannot extend against the goods of any other than the debtor.

5. Actions are either ordinary or rescissory. Actions ordinary and rescissory. All actions are in the sense of this division ordinary, which are not rescissory. Rescissory actions are divided into actions of proper improbation. 2. Actions of reduction-improbation. 3. Actions of simple reduction. Proper improbations, which are pursued for declaring writings false or forged, are treated of below, 4. 4. 23. Reduction-improbation is an action, Reduction-improbation. whereby a person who may be hurt or affected by a writing, insists for the production thereof in court, in order to have it set aside or its effect ascertained, under the certification that the writing, if not produced, shall be declared false, forged, and improven. This certification is a fiction of law, introduced that the production of writings may be the more effectually forced; and therefore it operates only in favour of the pursuer, (4. 2. 20.) so that the writing

writing, tho' declared false, continues in full strength, as to third parties. Because the summons in this process is founded on alledged grounds of falshood, his Majesty's Advocate, who is the public prosecutor of crimes, must concur in it.

To whom
competent.

6. This action may be founded, either upon a real interest, or a personal. A proprietor of lands has a real interest to reduce all deeds affecting his estate: and tho' a pursuer's interest, in consequence of his property, appears to be equally strong, whether the deeds challenged flow from his author or not; yet by our practice hitherto, no writing can be called for in this process, but these which have been granted by persons, with whom the pursuer connects a progress, *St. 595.—F. 16. Dec. 1709, L. Innercauld.* By our older forms, one whose right to lands was merely personal, could not call for seisions of these lands in order to reduction; but now he can, if they are granted by his author, *24. Jan. 1739, Keith.* Where the writings called for, were not granted to the defender himself, but conveyed to him under singular titles, the pursuer was formerly obliged to cite the defender's authors who were liable to their disponee in warrandice; but to prevent unnecessary delays, defenders are, by the present practice, obliged to cite their own authors, *Aff. S. 16. Feb. 1723.* A reduction-improbation is founded on a personal interest, when one insists for certification against deeds granted by himself, or by any of his predecessors whom he represents by service; but this is not competent to an apparent heir, because he can have no interest till he be served.

7. As

7. As the certification in this process draws after it so heavy consequences, three successive terms were, by the former practice, assigned to the defenders for production, which are reduced to two, by 1672, c. 16, §. 25, *concerning the Session*. After the second term is elapsed, intimation must be made judicially to the defender, to satisfy the production within ten days; and till these are also expired, no certification can be pronounced, *Act. S. 1. Jan.*

1709. Certification cannot pass against writings recorded in the books of Session; provided a condescendence thereof, containing the dates of their registration, be offered before extracting an act for the second term, because such writings, being in the custody of the keeper of the Session-register, are considered as already in the hands of the clerk of court: but such condescendence is not sufficient to stop certification against charters, retours and other writings recorded in chancery, 20. *March 1633, the King's Majesty*; because the record of chancery is independent of that of the Session. In the case of a writing registred in the books of an inferior court, an extract itself from the register will not defend against certification: the defender must apply for a warrant to transmit the principal writing to the process.

8. In an action of simple reduction, the certification is only temporary, declaring the writings called for, null until they be produced; so that they recover their full force after production, even against the pursuer himself; for which reason, that process is now seldom used. Because its certification is not so severe as in reduction-improbation, there is but one term assigned

Terms assigned for production.

Can certification pass against writings in publica custodia.

Simple reduction.

signed to the defender for producing the deeds called for.

Grounds
of reduction.

9. The most usual grounds of reduction of writings are, the want of the requisite solemnities (3. 2. 3.) or that the granter was minor; (1. 7. 19.) or interdicted; (1. 7. 34.) or inhibited; (2. 11. 2.) or that he signed the deed on death-bed; (3. 8. 46.) or was compelled or frightened into it; or was circumveened; or that he granted it, in prejudice of his lawful creditors.

Reduction
upon
force or
fear or
circum-
vention.

10. In reductions on the head of force, or fear, or fraud and circumvention, the pursuer must libel the particular circumstances from which his allegation is to be proved: and, tho' not any one of them should be relevant by itself, they may, when joined together, be sufficient to reduce the deed. Where therefore there is the least appearance of relevancy; the Lords are in use, before answer, *i. e.* before pronouncing any interlocutor upon the relevancy of the circumstances libelled, to allow a conjunct proof to both parties, as to the manner of granting the deed. Reduction is not competent upon every degree of force or fear: it must be such as would shake a man of constancy and resolution. Neither is it competent on that fear which arises from the just authority of husbands or parents, over their wives or children, *l. 21. 22. de rit. nupt.*; or of magistrates over these subjected to them, *l. 3. §. 1. quod met. caus.* Nor upon the fear arising from the regular execution of lawful diligence by caption, provided the deeds granted relate to the ground of debt contained in the diligence, 22. Jan. 1667, *Mair*: but if they have

no

no relation to that debt, they are reducible *ex metu*, F. 4.

11. Where a person of a weak or facile temper executes a deed in itself irrational, the most slender circumstances of fraud on the part of the receiver, will be laid hold of, to set it aside; but without some such circumstance, the deed must stand: for, let a person be ever so subject to imposition, if he is not farious or legally interdicted, his deeds are effectual, unless they have been elicited from him by unfair practices. Yet where the deed itself discovers oppression, or a catching an undue advantage from the necessities of our neighbour, dole is said *inesse in re*, and so requires no extrinsic proof. Thus, a bond taken from an heir for quadruple the sum lent, payable in the event he should succeed to his predecessor, was reduced, except as to the principal sum really advanced, and interest, 13. July 1745, *Abercromby*.

12. The reduction of alienations in prejudice of creditors, is founded upon act 1621, on upon c. 18, which we have borrowed from the *Roman law*, l. 1. *et seq. quae in fraud. cred.* By the first part of this statute, all alienations granted after contracting of lawful debts, in favour of conjunct or confident persons, without true, just and necessary causes, and without a just price really paid, are declared null. One is deemed a prior creditor, whose ground of debt existed, before the right granted by the debtor, tho' the document of the debt should bear a date posterior to it, 21. Jan. 1669, *Creditors of Pollock*.—27. July 1669, *Street*. Persons are deemed conjunct, whose relation

Reducti-
on upon
the act
1621.

First part
of the act.

to

Conjunct
or confi-
dent per-
sons.

to the granter is so near, as to bar them from judging in his cause, 8. *Feb.* 1712, Lord *Ellenbank*. Confident persons are those who appear to be in the granter's confidence, by being employed in his affairs, or about his person; as a writer, steward, or domestic servant.

What
deeds are
reducible.

13. Tho' by the letter of this act, the right to be reduced must be granted, both without a price paid, and in favour of a conjunct or confident person, yet by practice, gratuitous rights, even where they are granted to strangers, are subject to reduction. But rights, tho' gratuitous, are not reducible, if the granter had, at the date thereof, a sufficient fund for the payment of his creditors, *D.* 287.—*H.* 9. Provisions to children are, in the judgment of law, gratuitous; so that their effect, in a question with creditors, depends on the solvency of the granter. But settlements to wives, either in marriage contracts, 18. *Nov.* 1729, *Creditors of Thoirs*, or even after marriage, are onerous in so far as they are rational; and consequently are not reducible, even tho' the granter was insolvent, 11. *Jan.* 1738, *Robertson*.—17. *Feb.* 1738, Sir *R. Mackenzie*. This rule holds also in rational tochers contracted to husbands, 22. *Jan.* 1714, *Lockhart*: but both are to be qualified with this limitation, if the insolvency was not publicly known; because in that case, it is a fraud in the receiver of the right, to contract with the bankrupt, 23. *Nov.* 1680, *Wood*.—*Br.* 72.

On whom
does the
burden of
the proof
lie.

14. The creditor who quarrels the deed, must, by the words of the act, prove that it was gratuitous, either by the oath or writing of the receiver; but, as the statute is now explained,

plained, the receiver must abstract or support the onerous cause of his right, not merely by his own oath, but by some circumstances or adminicles, 15, Dec. 1671, *Duff*: if there is no real ground of suspicion, the slightest adminicles will serve, *H.* 105. Where a right is granted to a stranger, the narrative of it expressing an onerous cause is sufficient *per se*, to secure it against reduction, 22. June 1680, *Trotter*.

15. By a second branch of this statute, all voluntary payments or rights made by a bankrupt to one creditor, in fraud of the more timeous diligence of another, are reducible at the instance of that creditor who has used the prior diligence. Rights granted by the debtor, in consideration of sums instantly advanced by the receiver, are not securities given to creditors, and so do not fall under the sanction of the statute; e. g. a sale of lands, 8. Feb. 1681, *Neilson*, or a bond of borrowed money, 28. June 1665, *Monteith*. If the diligence of a creditor be but inchoated, it is sufficient ground for the reduction of posterior voluntary rights granted to his prejudice, *F.* 9. Jan. 1696, *Brown*; but the creditor who neglects to compleat his begun diligence within a reasonable time, is not intitled to reduce any right granted by the debtor, after the time that the diligence is considered as derelinquished, 9. July 1709, *Drummond*.

16. A prohibited alienation, when conveyed by the receiver to another who is not privy to the fraud, subsists by the statute in the person of the *bona fide* purchaser. Where the conjunction or confidence between the grantor and receiver

Second
branch of
the act.

What is
meant by
prior dili-
gence.

The re-
duction
not good
against
singular
successors.

Nullity
when re-
ceivable
by excep-
tion.

Reducti-
on upon
the act
1696.

receiver cannot be perceived, either from the tenor of the right, or from the conveyance of it to the purchaser, the purchaser is not presumed to have been partaker of the fraud, 9. *Jan.* 1730, *Allan*. The statute declares all alienations made contrary thereto, to be null, either by way of action or exception. But in practice, it is only in the case of moveable rights, that the nullity is receivable by exception, 16. *June* 1671, *Bower*: it must be declared by reduction, where the right is heritable, 22. *July* 1664, *Lord Loure*.

17. By act 1696, c. 5, all alienations by a bankrupt within 60 days before his bankruptcy, to one creditor in preference to another, are reducible, at the instance even of such co-creditors as have not used the least step of diligence. A bankrupt is there described by the following characters; diligence against him by horning and caption; and insolvency, joined either with imprisonment, retiring to the sanctuary, absconding, or forcibly defending himself from diligence. It is sufficient that caption is raised against the debtor, tho' it be not executed, provided he has retired to shun it, 24. *Feb.* 1737, *Lord Kilkerran*. This act provides, that all heritable bonds or rights on which seisin may follow, shall be reckoned, in a question with the granter's other creditors, to be of the date of the seisin following thereon; and it has been variously decided, whether heritable bonds granted in security of debts presently contracted, fall under this branch of the statute; but by the last decision, *F. v.* 2. 189, the act was found to relate only to securities for former debts, and not to *nova debita*.

18. Dispositions

18. Dispositions granted by a debtor, in trust for the behoof of his creditors, even tho' they should contain no unreasonable or partial clause preferring any one of them before the rest, are reducible by such of the creditors as do not consent or accede thereto; for the right which law has given to creditors, to affect their debtor's estate by diligence, cannot be excluded or restrained, by a deed of the debtor, imposing a trustee upon them without their own consent, 12. *July 1734, Snee*. The rescissory action of reprobator is explained below, 4. 2. 15. 16.

Trust
rights, if
reducible.

19. Actions are either *rei persecutoriae*, by which the pursuer insists barely to recover the subject that is his, or the debt due to him: and this includes the real damages sustained by the pursuer, *damnum et interesse*: Or penal, where something is sought by way of penalty, over and above repetition and real damages; as in the action on the passive titles against vicious intromettors, where the pursuer recovers his whole debt, and not simply the value of the goods intrometted with.

Actions *rei*
persecuto-
riae or
penal.

20. Actions of spuilzie, ejection and intrusion, are penal. An action of spuilzie is competent to one dispossessed of a moveable subject violently, or without order of law, against the the person dispossessing, not only for being restored to the possession of the subject, if extant, or for the value, if it be destroyed, but also for the violent profits, (as to which, see 2. 6. 23.) in case the action be pursued within three years from the spoliation. The pursuer need prove no more, than that he was in lawful possession: nay, tho' the defender should offer

Action of
spuilzie.

Ejection
and intru-
sion.

offer to prove himself proprietor, it is no good defence; for he ought *non jus sibi dicere*. But it is a relevant defence, that the defender had a probable title for what he did, *quilibet titulus excusat a spolio*; or that he made voluntary restitution *de recenti*, of the goods spuilzied, *cum omni causa*. Ejection and intrusion are in heritable subjects, what spuilzie is in moveables. The difference betwixt the two first is, that in ejection violence is used, whereas the intruder enters into the void possession, without either title from the proprietor, or the warrant of a judge. The actions arising from all the three, are of the same general nature.

Contra-
vention of
law-bor-
rows.

21. The action of contravention of law-borrows is also penal. It proceeds on letters of law-borrows (from borgh, caution) which contain a warrant to charge the party complained upon, that he may find security, not to hurt the complainer in his person, family or estate, 1429, c. 129.—1581, c. 117. These letters do not require the previous citation of the party complained upon, because the caution required, is only for doing what is every man's duty; but, before the letters are executed against the person complained upon, the complainer must make oath that he dreads bodily harm from him. The penalty of contravention is ascertained to a special sum, according to the offender's quality, the half to be applied to the fisk, and the half to the complainer, 1593, c. 166; which may be demanded, tho' the person complained upon, should not have found caution, in obedience to the letters. Contravention is not incurred by reproachful words uttered against the complainer, where they

they are not accompanied, either with acts of violence or at least a real injury; and, as the action is penal, it is elided by any probable ground of excuse.

22. Penalties are the consequence of delict or transgression: and as no heir ought to be accountable for the delict of his predecessor, further than the injured person has really suffered by it; penal actions die with the delinquent, and are not transmissible against heirs. Yet the action, if it has been commenced and litis-contested in the delinquent's lifetime, may be continued against the heir, tho' the delinquent should die during the dependance: for by litis-contestation, the former ground of action is innovated, and a judicial contract understood to be entered into by the parties, subjecting themselves to the decision of the judge; from which a new quality is communicated to the action. By litis-contestation in the law of *Scotland*, is understood an extracted interlocutor of the judge, admitting the libel or defences to a proof, 7. Feb. 1712. *Stuart*.

Penal actions not transmissible against heirs.

Exception to this rule.

23. The most celebrated division of actions in our law, is into petitory, possessory, and declaratory. Petitory actions are these where something is demanded from the defender, in consequence of a right of property or of credit in the pursuer's person: thus, actions for restitution of moveables, actions of poyniding, of forthcoming, and indeed all personal actions upon contracts or quasi-contracts, are petitory. Possessory actions are these which are founded, either upon possession alone, as spuilzies; or upon possession joined with another title, as removings, (2. 6. 22.) and they are competent, either

Actions petitory,

Possessory,

either for getting into possession, for holding it, or for recovering it; analogous to the interdicts of the *Roman law*, *quorum bonorum, uti possidetis*, and *unde vi*. The nature and privileges of possession have been already explained, (2. 1. 12. *et seqq.*)

Action of
molestation.

24. An action of molestation is a possessory action, competent to the proprietor of a land estate, against those who disturb his possession. It is chiefly used in questions of commonry or contraverted marches. Where it is pursued before the Session, the Lords are, by an act of *federunt*, ratified 1587, c. 42, ordained to remit the cause to the Sheriff of the county where the lands lie; who is impowered to take cognition of the marches, and to put the facts contained in the libel and defences, to the knowledge of an inquest, consisting of persons dwelling in the parish, most of them landed men: but this is now seldom practised; for the Lords ordinarily allow a proof to be brought before themselves, and give judgment thereupon. Where a declarator of property is conjoined with the process of molestation, the court of Session alone is competent to the action. Actions on brieves of perambulation, 1579, c. 79, have the same tendency with molestations, *viz.* the settling of marches between conteminous lands; the difference stated by some lawyers between the two, is, that the first sort is founded solely on a right of property, and so is petitory; whereas in molestations, the pursuer founds also on his possession.

Action of
mails and
duties.

25. The action of mails and duties is sometimes petitory, and sometimes possessory. In either case, it is directed against the tenants and
natural

natural possessors of land estates, for payment to the pursuer of the rents remaining in the hands of the defenders for bygone crops, and of the full rent in all time coming. It is competent, not only to a proprietor whose right is perfected by seisin, but to a simple disponee; for a disposition of lands includes a right to the mails and duties: and to an adjudger; for an adjudication is a judicial disposition. In the petitory action, the pursuer, since ^{Petitory.} he founds upon right, not possession, must make the proprietor of the lands from whom the tenants derive their right, party to the suit: and he ought to deduce his titles from his predecessors or authors by charter and seisin, as high as he can, in his summons. In the pos- ^{Possessio-} sessory, the pursuer who libels that he, his pre- ry. decessors or authors, have been seven years in possession, and that therefore he has the benefit of a possessory judgment, need produce no other title than a seisin, which is a title sufficient to make the possession of heritage lawful; and it is enough, if he calls the natural possessors, tho' he should neglect the proprietor. A possessory judgment founded on seven years possession, in consequence either of a seisin or a tack, has this effect, that tho' one should claim under a title preferable to that of the possessor, he will not be suffered to compete with him in the possession, until in a formal process of reduction, he shall obtain the possessor's title to be declared void.

26. A declaratory action is that wherein ^{Declaratory acti-} some right is craved to be declared in favour of the pursuer, but nothing sought to be paid or ons. performed by the defender, such as declarators of

of marriage, of irritancy, of expiry of the legal reversion, actions competent to superiors or their donataries, for declaring casualties incurred by vassals, &c. Under this class may be also comprehended rescissory actions, which without any personal conclusion against the defender, tend simply to set aside the rights or writings libelled, in consequence of which, a contrary right or immunity arises to the pursuer. Declarators of property are now seldom used, because rights affecting property are more effectually forced into the field, by the action of reduction-improbation, which has always a declaratory conclusion subjoined to it. Decrees upon actions that are properly declaratory, confer no new right: they only declare what was the pursuer's right before, and so have a retrospect to the period at which that right first commenced, as in declarators of liferent escheat, (2. 5. 33.): but this character is not applicable to most of our declaratory decreets. Declarators, because they have no personal conclusion against the defender, may be pursued against an apparent heir, without a previous charge given him to enter to his predecessor, unless where special circumstances require a charge.

Their properties.

Action of proving the tenor.

27. An action for proving the tenor, whereby a writing which is destroyed or a missing, is endeavoured to be made up, is in effect declaratory. In obligations that are extinguishable barely by the debtor's retiring or cancelling them, the pursuer, before a proof of the tenor is admitted, must condescend on such a *casus amissionis*, or accident by which the writing was destroyed, as shews it was lost when in the creditor's possession; otherwise bonds that have been

Casus amissionis.

been retired by the debtor on payment, might be reared up, as still subsisting against him: but in writings which require contrary deeds to extinguish their effect, as assignations, dispositions, charters, &c. it is sufficient to libel that they were lost any how, even *casu fortuito*, *St. 635*.

28. Regularly, no deed can be revived by this action, without some adminicle in writing, *i. e.* without some collateral deed referring to that which is libelled; for no written obligation ought to be raised up, barely on the testimony of witnesses: yet where one's whole writings are destroyed by fire, or in other such special cases which call for an extraordinary remedy, a proof of the tenor may be admitted without any such adminicle, *St. 634*. If these adminicles afford sufficient conviction, that the deed libelled did once exist, the Lords admit the tenor to be proved by witnesses, who must depose, either that they were present at signing the deed, or that they afterwards saw it duly subscribed. Where the relative writings repeat all the substantial clauses of that which is lost, the tenor is sometimes sustained without witnesses, *F 26. June 1712, Inglis*. Where the writing libelled is said to have contained any clauses uncommon or extraordinary, all these must appear by the adminicles; otherwise a right might be reared up, of a quite different nature from that which was lost.

29. The tenor of all writings, both voluntary and judicial, may be proved by this action; even decrees of apprysing, which of all others require the greatest nicety of form, *D. 283*. By act 1579, c. 94, the tenor of letters

Admini-
cles in writ-
ting.

Can the
tenor of
all writ-
tings be
proved?

of horning and executions thereof, which have not been judicially produced, cannot be proved by witnesses; but this statute does not seem to extend to the case of hornings supported by written adminicles. Actions of proving the tenor are, because of their importance, appropriated to the court of Session, and the witnesses must give their testimonies in presence of all the Lords.

Multiple
poynding.

30. The action of double or multiple poynding may be also reckoned declaratory. It is competent to a debtor, who is distressed or threatened with distress, by two or more persons claiming right to the debt; and who therefore calls the several claimants into the field, in order to the debating and settling their several preferences, that so he may pay securely to him whose right shall be found preferable. This action is daily pursued by an arrestee, in case of several arrestments used in his hands for the same debt; or by tenants, in the case of several adjudgers, all of whom claim right to the same rents. In these competitions, any of the competitors may bring an action of multiple poynding in name of the tenants, or other debtor, without their consent, or even tho' they should disclaim the process; since law has introduced it as the proper remedy for getting such competitions determined. And in all such processes, while the subject in controversy continues *in medio*, any third person who conceives he has a right to it, may, tho' not called as a defender, produce his titles, and will be admitted for his interest in the competition.

31. Certain

31. Certain actions may be called accessory, Accessory actions.
 because they are merely preparatory or subser-
 vient to other actions. Thus, exhibitions Exhibitions.
ad deliberandum, (3. 8. 27.) are intended only to
 pave the way for future processes. Where a
 party in a suit was to prove a point, by writings
 which were in the hands of a third person, a
 separate action was, by our ancient forms, neces-
 sary for forcing the exhibition thereof, *St.* 683;
 but this is now done summarily by an incident Incident diligence.
 diligence granted by warrant of the court, a-
 gainst the havers or possessors of these writings,
 for exhibiting them. The person cited upon
 this diligence must either produce the writings
 called for, or depose that they neither have
 them, nor had them since the citation, nor
 have fraudfully put them out of their custo-
 dy to elude a future citation, nor suspect by
 whom they were taken away, nor where they
 presently are: see *Att. S.* 22. *Feb.* 1688.

32. An action of transference is also of this Transference.
 sort, whereby an action, during the dependance
 of which the pursuer or defender happens to
 die, is craved to be transferred from the de-
 funct to his representative, in the same condi-
 tion in which it stood formerly: if it is the
 pursuer who is dead, it was called a transfe-
 rence *active*; if the defender, it is a transfe-
 rence *passive*. Upon the pursuer's death, his
 heir may now, by 1693, *c.* 15, insist in the
 cause against the defender, without a transfe-
 rence *active*, upon producing, either a retour
 or a confirmed testament, according as the
 subject is heritable or moveable; but transfe-
 rences *passive* are by that act continued on the
 former footing; it being reasonable upon the
 death

death of a defender, to give previous notice to his heir, before he be obliged to defend in a process, of which perhaps he knew nothing before. Transferences, being but incidental to other actions, can be pronounced by that inferior judge alone, before whom the principal cause depended: but, where the representatives of the defunct live in another territory, it is the supreme court which must transfer, *Gofford, 9. Jan. 1674. Denbo'm.* By the above cited statute, obligations may be now registred summarily after the creditor's death, which before was not admitted, without a separate process of registration, to which the granter was necessarily to be made a party.

Wakning.

33. A process of wakening is likewise accessory. An action is said to sleep, when it lies over, not insisted in for a year, in which case its effect is suspended; but even then, it may, at any time within the years of prescription, be revived or wakened by a summons, in which the pursuer repeats the last step of the process, and concludes that it may be again carried on, as if it had not been discontinued. An action that stands upon any of the inner house rolls cannot sleep, nor an action in which decree is pronounced; because it has got its full completion: consequently the decree may be extracted after the year, without the necessity of a wakening.

Transumpt.

34. An action of transumpt falls under the same class. It is competent to those who have a partial interest in writings that are not in their own custody, against the possessors thereof, for exhibiting them, in order to be transumed for their behoof. The ordinary title in

in this process be an obligation by the defender, to grant transumps to the pursuer, it is sufficient, if the pursuer can show that he has an interest in the writings; but, in this case, he must transume them on his own charges. Actions of transumpt may be pursued before any judge ordinary. After the writings to be transumed are exhibited, full doubles are made out, collated and signed, by one of the clerks of court, which are called transumps, and are as effectual as an extract from the register, so that they cannot be defeated but by improbation; in which case, the user of the transumpt must either produce the principal writings themselves, upon a diligence, or otherwise, suffer certification to pass against them. Advocations (1. 2. 20.) and suspensions (4. 3. 5.) are not so properly accessory actions, as judicial steps that give a new form to the actions to which they relate. Summonses *prævento termino*, which were raised for shortening the days of compareance assigned in suspensions or advocations, are now seldom used; for the clerk to the bills, by the present practice, observes a fixed rule with respect to these days of compareance, and passes no suspension or advocacy upon long days, as the custom was formerly.

Summon-
ses *præ-
vento ter-
mino*.

35. Actions proceeded antiently, upon brieves issuing from the chancery, directed to the justiciary or judge ordinary, who tried the matter by a jury, upon whose verdict, judgment was pronounced: and to this day, we retain certain brieves, as of mortancestry, ideotry, tutory, perambulation and perhaps two or three others.

Actions
proceeded
antiently
on brieves.

But

Now, on But summonses were, in consequence of the institution of the college of justice, introduced into our law, in place of brieves. A summons, when applied to actions pursued before the Session, is a writ in the King's name, issuing from his signet upon the pursuer's complaint, authorizing messengers to cite the defender to list himself before the court and make his defences. When it passes the signet, it contains little more than the pursuer's name, and the date of signeting: but, before it is executed, not only the defender's name and the days of comparance must be filled up in the blanks left in the summons for that purpose (which was always necessary from the nature of the thing); but the libel also must be ingrossed in the summons, setting forth the pursuer's ground of action against the defender, *Act. S.* 16. *Feb.* 1723, and 19. *Feb.* 1742, which, by the former custom, might have been done at any time before calling the summons in court.

Blank
summons.

Libelled
summons.

*Inducia
legales.*

Privileged
summons.

36. The days indulged by law to a defender, between his citation and comparance, to prepare for his defence, are called *inducia legales*. If he is within the kingdom, twenty one and six days, for the first and second diets of comparance, must be allowed him for that purpose; and, if furth thereof, sixty and fifteen. Defenders residing in *Orkney* or *Zetland* must be cited on 40 days, 1685, c. 43. In certain summonses which are privileged, the *inducia* are shortened: spulzies and ejections proceed on 15 days; wakenings and transferences being but incidental, on six; see the list of privileged summonses, in *Act. S.* 29. *June* 1672.

A summons must be executed, *i. e.* served against the defender, so as the last diet of comparance may be within a year after the date of the summons; and it must be called within a year after that last diet: otherways, it falls, as if it had not been raised. Acts of malversation in office by any member of the court, offences against the Lords' authority, and acts of violence and oppression, committed during the dependance of a suit by any of the parties, may be tried without a summons, by a summary complaint.

Actions
triable
without
summons.

37. Different civil actions were by the *Roman* law frequently competent, upon the same ground of right, to the pursuer, who, after he had prevailed in one action, might insist in the other, in so far as it contained more than he had recovered by the first. Our law affords no instance of such concurrence; and where an action comprehends more than simple restitution, *e. g.* a removing, *spuilzie*, &c. a pursuer who restricts his demand to, and obtains decree merely for restitution, cannot thereafter commence a new process for the violent profits. Yet the same fact may be the foundation both of a criminal and civil action; because the two have really different pursuers, and are intended for different purposes: the one must be prosecuted by the King's Advocate, or at least with his concurrence, for satisfying the public justice; the other by the private party, for his own indemnification or relief. In such a case, tho' the defender should be absolved in the criminal trial, for want of evidence by witnesses, it is competent to the party injured, to insist *ad civilem effectum*; because, in prosecutions

Con-
course of
actions.

tions that are properly criminal, the defender cannot be compelled to swear against himself; whereas, in all actions restricted to a civil effect, the pursuer, if he cannot prove his libel by the testimony of witnesses, may refer it to the oath of his party.

Accumulation of actions.

38. Where different actions were competent on the same subject or ground of right, they could not, by the *Roman* law, be insisted in at once, in the same libel, *L. 43. § 1. de reg. jur.* With us, separate conclusions arising from the same fact, or affecting the same subject, may be accumulated into one libel, provided they be not repugnant to one another: thus, a person who is to reduce a writing from which a consequential right arises to himself, may subjoin to a reduction of the defender's right, a declarator of his own, in the same summons. By the *Roman* law, one who had separate claims against another, proceeding upon rights or obligations of the same nature, might pursue them all in the same action; as in the case of two separate copartneries entered into by the same persons, *l. 52. §. 14. pro Socio—l. 25. §. 3. fam. etc.* And by our law, a creditor, to whom two or more sums are due upon separate grounds of debt, even by different debtors, may throw all into one summons: but this is not properly an accumulation of different actions into one libel; for every separate claim or debt is understood to make a separate libel, and requires a separate discussion by the judge: *quot articuli, tot libelli.*

TIT. 2.

TIT. 2. Of Probation.

ALL allegations by parties in a suit must be supported by proper proof. Probation is either by writing, by the parties own oath, or by witnesses. In the case of allegations which may be proved by either of the three ways, the party is said to be allowed a proof, *prout de jure*; because, in such case, *Prout de* all the legal methods of probation are competent to him without exception: if the proof he brings by writing is lame, he may have recourse to witnesses; if that also fails him, he may refer the point to the oath of his adversary: but, if he should first take himself to the proof by oath, he cannot thereafter use any other probation; for the reason assigned

§ 3. Single combat, as a sort of appeal to providence, was, by our ancient law, admitted as an ordinary method of probation, in matters both civil and criminal, *R. M. l. 3. c. 13. §. 4.* It was restricted by *St. R. III. c. 16.* to the case of capital crimes, where no other proof could be had: and some vestiges of this blind method of trial appear to have remained in the reign of *Ƴ. VI. 1600. c. 12*; for even by that statute, the King might authorize duels upon weighty occasions.

2. As obligations or deeds, signed by the party himself, or his predecessors or authors, must be of all evidence the least liable to exception, therefore every debt or allegation may be proved by proper documents in writing.

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The

The solemnities essential to probative deeds have been already explained (3. 2. 3. *et seqq.*). Books of account kept by merchants, tradesmen and other dealers in business, tho' not subscribed, are probative against him who keeps them: and, in case of furnishings by a shop-keeper, such books, if they are regularly kept by him, supported by the testimony of a single witness, afford a *semiplena probatio* in his favour, which becomes full evidence by his own oath in supplement, *Gosford 5. June 1672. Wood.* Notorial instruments and executions by messengers, are full evidence that the solemnities therein set furth, were used, not to be redargued otherways than by a proof of falshood; but they do not prove any other extrinsic facts therein averred, against third parties, nor are they evidence of the warrants on which they proceed: thus, a seifine does not prove the existence of the relative charter, *20. Dec. 1664. Norvel; non enim creditur referenti, nisi constet de relato.*

By oath of
party on
reference

3. Regularly, no person's right can be proved by his own oath, nor taken away by that of his adversary; because these are the bare averments of parties in their own favour. But, where the matter in issue is referred by one of the parties, to the oath of the other, such oath, tho' made in favour of the deponent himself, is decisive of the point; not because a party's oath in his own cause is evidence, but because the reference is a virtual contract between the litigants, by which they are understood to put the issue of the cause upon what shall be deposed: and this contract is so strict, that the party who defers to the oath of the other,

ther, cannot plead upon any deed against that party, inconsistent with his oath, *H. 31.* To obviate the snares that may be laid for perjury, he, to whose oath of verity a point is referred, may refuse to depose, till his adversary swear, that he can bring no other evidence in proof of his allegation, *St. 698.* The party to whom reference is made, in place of making oath, sometimes defers the point back to his adversary: but this is not indulged, unless it shall appear, from the circumstances of the case, that he himself cannot depose in the matter referred to him, with distinctness.

4. A defender cannot be compelled to swear to facts in a criminal libel, which concludes either capital or corporal punishment, or infamy: but, where the conclusion of the libel draws no deeper than a pecuniary mulct, he may; as in bloodwits, batteries, or smaller injuries, *2. July 1736. Stuart.* The crime of usury, as it is of most difficult proof, may, by special statute, be proved by the usurer's oath, *1600. c. 7.* An oath of party, tho' it must be effectual against the person referring, and his representatives, cannot hurt third parties; being, as to these, *res inter alios acta*, *l. 9. §. 7, l. 10. de jurej.*; hence, a wife's oath, acknowledging a debt contracted by her before marriage, cannot operate against the husband, *9. March 1627. Ker*; nor a tutor's oath upon a debt due by the minor's predecessor, against the minor: but a tutor's oath, as to deeds of administration done by himself, will prove against the minor, *12. Dec. 1661. Hepburn.*

In what cases a party is not obliged to depose.

An oath of party affects only the litigants.

Qualified
oaths.

Qualities,
either in-
trinsic or
extrinsic.

5. An oath upon reference, is sometimes qualified by special limitations restricting it. These which are admitted by the judge as part of the oath, are called intrinsic qualities; these which the judge rejects or separates from the oath, extrinsic. Where the quality makes a part of the allegation which is relevantly referred to oath, it is intrinsic. Thus, because a merchant, pursuing for furnishings after the three years, must, in order to make a relevancy, libel not only delivery of the goods, but that they are still resting; therefore, tho' the defender should acknowledge upon oath his having received the goods, yet, if he adds that he paid the price, this last part, being a denial that the debt subsists, is intrinsic; seeing it is truly the point referred to oath. Where the quality does not import an extinction of the debt, but barely a counter claim, or *mutua petitio*, against the pursuer, it is held as extrinsic, and must be proved *aliunde*. The quality of compensation is extrinsic, 9. Dec. 1664, *Learmont*; for compensation does not operate by the law of *Scotland*, *ipso jure*. A creditor, in a holograph bond, is not obliged, even after the triennial prescription, to libel resting owing; but simply, that the bond was subscribed by the debtor, 1669. c. 9.: the quality of payment is therefore, in this case, extrinsic, and resolves into a defence, being no part of the libel referred to oath.

6. One who pursues on a debt, constituted neither by writing nor before witnesses, must refer, not only its constitution, but subsistence to the defender's oath: since the oath of the debtor, by which alone the debt can be proved, ought

ought to be also effectual for a proof of its payment; the quality therefore of payment or satisfaction must, in such case, be intrinsic, by the above-mentioned rule, 14. Jan. 1737, *Moffat*. Yet a defender who, in his oath, admits the constitution of a debt, cannot get off by adjecting the quality of payment, where the payment ought, by its nature, to be vouched by a written document, 23. Dec. 1707, *Brown*. The observations made upon this point, apply with equal force, to the case where the defence of payment is referred by the defender to the pursuer: thus, if the creditor depose, that the money he received was not in payment of the debt pursued for, but in consequence of a separate bargain, the quality is intrinsic, being really a denial of the point referred to oath, 27. Nov. 1705, *Sinclair*; but if he acknowledges that he received a sum in payment, it will not avail him, tho' he should add, that he had afterwards disbursed it on the debtor's account.

7. Oaths of verity are sometimes deferred by the judge to either party *ex officio*, which, because they are not founded on any implied contract between the litigants, are not finally decisive, but may be redargued on proper evidence afterwards adduced; or the cause, if it has been pursued before an inferior court, may be advocated, in respect the judge had no good reason to take the party's oath. These oaths are commonly put by the judge, for supplying a lame or imperfect proof, and are therefore called, oaths in supplement. There are frequent instances of them, in that sort of disbursements by factors, which does not easily admit

Oath in
supple-
ment.

mit of vouchers; or in furnishings by merchants, the quantity or prices of which, are not fully proved by witnesses. Where the evidence brought before the judge does not amount, even to a *semiplena probatio*, he ought not to take the party's oath in supplement, *F. 28. Dec. 1695, Thomson*. After a party deposes, upon a reference, either of his adversary or of the judge, in general terms, he cannot be re-examined upon any particular fact which may involve him in perjury, *D. 453*. And least parties should be led into the suspicion of that crime, the Lords, where special interrogatories are to be put, begin with these, and then proceed to the general one, see *F. 10. Nov. 1702, Aitken*.

Oath of
calumny.

8. To prevent groundless allegations, oaths of calumny have been introduced, by which either party may demand his adversary's oath, that he believes the facts contained in his libel or defences, to be just and true, *1429, c. 125*. As this is an oath, not of verity, but only of opinion, the party who puts it to his adversary, does not renounce other probation, *St. 702*; and therefore no party is bound to give an oath of calumny, on recent facts of his own, *Art. S. 13. Jan. 1692*; for such oath is really an oath of verity. Formerly, parties, even after they had proved their allegations, might have been compelled to swear *de calumnia*, *13. Jan. 1625, Lord Duffus*: but these oaths are now confined to the cases where the proof is not yet brought, or where it is defective, *F. 22. Dec. 1699, Logy*. They do not take place in reductions-improbations before production; for the pursuer's allegation

allegation that the writings called for are false, is founded merely in a *fictio juris*, and so is not inconsistent with his belief that they are genuin, *Dalr.* 22. Nov. 1716, Sir P. Hume. They have not been so frequent, since act of Sed. 18. Feb. 1715, §. 6, whereby any party against whom a fact shall be alledged, is obliged, without making oath, to confess or deny it; and, in case of calumnious denial, is subjected to the expence the other party has thereby incurred.

9. In all oaths, whether of verity or calumny, the citation carries, or at least implies, a certification, that if the party does not compare at the day assigned for deposing, he shall be held *pro confesso*; from a presumption of his consciousness, that the fact upon which he declines to depose, is against him. The Lords, however, are in use to repon the party, who offers *de recenti* to purge his contumacy, upon his refunding to his adversary the expence he has been put to by the delay: but no person will be reponed *ex intervallo*, where the adverse party is in danger of losing his other probation, unless on the most pregnant grounds. Where one is reponed *ex justitia*, e. g. because he was not legally cited, the effect of the certification is intirely taken off, *Harc. (Oaths)* Feb. 1686,—*contra* Lord Rutherford: but if he be reponed *ex gratia*, and happens to die before deposing, the presumptive confession operates against his heir. Tho' an oath which resolves into a *non memini*, cannot be said to prove any point, yet where one so deposes in his own recent facts, of which he cannot be presumed ignorant, his oath is considered as a concealing

A party not comparing to depose is held *pro confesso*.

concealing of the truth, and he himself is held *pro confesso*, 6 Feb. 1675, *Irvine*.

Oath in
litem.

10. An oath *in litem*, is that which the judge defers to the pursuer, for ascertaining, either the quantity or the value of the goods taken from him without order of law, or the extent of his damages. An oath *in litem*, as it is the affirmation of a party in his own behalf, is only allowed, where there is proof that the other party has been engaged in some illegal act, *e. g.* in a spuilzie, or in an unwarrantable intermeddling with the pursuer's goods: or where the public policy has made it necessary; as in the case of *nautae, caupones, stabularii*. (3. 1. 11.) This oath, as to the quantity, has no place, where there is a concurring testimony of witnesses brought in proof of it, see *F.* 16. Jan. 1697, *Fea*. When it is put as to the value of goods, it is only an oath of credulity, and therefore it has always been subject to the modification of the Lords, *Harc. (Oaths)* Feb. 1684, *Dougal*: but as a further check upon exorbitant values that may be put by the party on his own goods, the Lords have, by the later practice, ordained the pursuer, before making oath, to exhibit a special condescendence of the prices, with the grounds on which it proceeds, which they tax as they see reasonable, and then admit the oath, not exceeding such previous modification, 19. Nov. 1737, *Man*.

Probation
by wit-
nesses.

11. Antiently, when writing was little used, most points might have been proved by witnesses, *R. M. l. 3. c. 1. §. 22. 23. &c.* Even that possession, which is essential to heritable rights, depended on the testimony of the *pares curiae*,

curiae (2. 3. 15.); but after writing came to be a more general accomplishment, the lubricity of testimonies made it necessary, to bring probation by witnesses within a narrower compass. By a constitution of *Cb. IX. of France* dated 1566, all contracts for sums exceeding 100 livres, must be reduced into writing. The law of *Scotland*, tho' it has not carried this point so far, rejects the testimony of witnesses, 1. In payments of any sum above *L. 100 Scots*, all which must be proved either *scripto vel juramento*, by *Act. S. 8. June 1597.*— 2. In all gratuitous promises, which, tho' for the smallest trifle, cannot be proved by witnesses; seeing, as their force depends intirely on the import of the words uttered by the promiser, he may be misunderstood by inattentive hearers, 19. *Jan. 1672, Deuchar.* 3. In all contracts, where writing is either essential to their constitution, (3. 2. 2.) or where it is usually adhibited, as in the borrowing of money. And it is a general rule, subject to the restrictions mentioned in the next §, that no debt or right, once constituted by writing, can be taken away by witnesses.

In what cases, rejected.

12 On the other part, probation by witnesses is admitted, 1. In nuncupative legacies not exceeding *L. 100 Scots.* 2. In all bargains which have known prestations naturally arising from them, concerning corns, cattle, shop-goods or other moveable subjects, and that to the greatest extent. 3. This sort of proof is received in facts performed, in implement even of a written obligation, where such obligation binds the party precisely to the performance of them, 25. *Nov. 1624, Bisset;*—7. *Jan,*

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In what cases, admitted.

1662, E. Lauderdale. 4. In facts which, with difficulty, admit of a proof by writing, even tho' the effect of such proof should be the extinction of a written obligation, especially if the facts import fraud or violence; thus, a bond is reducible *ex dolo*, upon a proof by witnesses. Lastly, all payments in grain, or even in money, where they are made, not by the debtor himself, but by another, e. g. his tenant, may be proved by witnesses, 4. Feb. 1671, *Wishart*,—25. Jan. 1711, *Bailly*; for the debtor ought not to suffer, because his tenants have neglected to take written documents on the payment.

What persons are received as witnesses.

13. No person, whose near relation to another bars him from being a judge in his cause, (1681, c. 13) can be admitted as a witness for him; but he may, against him, 24. Nov. 1709, *Monteith*; except a wife or child, who cannot be compelled to give testimony against the husband or parent, *ob reverentiam personae et metum perjurii*, F. 23. July 1700, *Erskine*.—*eod. die*, *Drummond*. Tho' the witness whose propinquity is objected to, by one of the parties, be as nearly related to the other, the objection stands good, *Mill*. 48. The testimony of domestic servants is rejected, because of their dependance on their masters; but day-labourers are habile witnesses for these who employ them, F. 26. Feb. 1685, *Erskine*. Formerly, moveable tenants, i. e. who have no written tacks, were disallowed; from the presumed influence of their masters over them: but now, since that influence is much wore out, our present practice admits them, 15. Jan. 1735, *Blackader*.

14. The

14. The testimony of infamous persons is rejected, *i. e.* persons who have been guilty of crimes that law declares to infer infamy, or who have been declared infamous, by the sentence of a judge; but *infamia facti* does not disqualify a witness, 31 Jan. 1671, Lady *Milton*. Pupils are inhabile witnesses; being, in the judgment of law, incapable of the impositions of an oath. The testimony of women is always received, when it is *necessary*, *i. e.* when the fact cannot be without them: and is seldom admitted where other witnesses can be had, Feb. 1722, *Dumbar*.—13. Jan. 1736, *Wiseman*. Near kinsmen or domestic servants, may, where there is a penury of witnesses, arising from the nature or circumstances of the fact, be received *cum nota*; that is, their testimony, tho' not quite free from suspicion, is to be conjoined with the other evidence, and to have such weight given it, as the judge shall think it deserves. Witnesses received *cum nota*.

15. All witnesses, before they are examined in the cause, are purged of partial council, that is, they must depose, that they have no interest in the suit, nor have given advice how to conduct it; that they have got neither bribe nor promise, nor have been instructed how to depose; and that they bear no enmity to either of the parties. These, because they are the first questions put to a witness, are called *initialia testimonii*. *Initialia testimonii.* Where a party can bring instant proof of a witness's partial council, in any of the above particulars, he ought to offer it, before the witness be sworn; but, because such objection, if it cannot be instantly verified, will be no bar to the examination, law allows the

Reprobator.

the party who suspects a witness, to protest for reprobator, immediately before his examination, *i. e.* that he may be afterwards allowed to bring proof of his enmity or other inhability.

In what cases it is admitted.

16. The Lords, by the former practice, admitted action of reprobator, tho' no such protestation had been entered, so long as sentence was not pronounced in the principal cause; provided it could be admitted, without prejudice to him who adduced the witness, *F. 13. July 1700, Goodin*: but by the present practice, reprobators are not received, unless specially protested for at the examination of the witness, even tho' he who adduced him, can qualify no prejudice, by the intermediate death of others, whom he might have brought for proof of the same facts, *5. Jan. 1737, Wright*. Reprobator is competent even after sentence, where protestation is duly entered, *26. June 1623, Cochran*; but in that case, the party insisting must consign *L. 100 Scots*, which he forfeits if he succumb, *3. Dec. 1635, Robinson*. This action must have the concurrence of the King's Advocate, because the conclusion of it imports perjury; and for this reason, the witness must be made a party to it, *9. Nov. 1676, Paterson*.

Diligence against witnesses.

17. The interlocutory sentence or warrant, by which parties are authorized to bring their proof, is either by way of act, or of incident diligence. In an act, the Lord ordinary who pronounces it, is no longer judge in the cause: but in an incident diligence, which is commonly granted upon points that do not exhaust the cause, the ordinary continues judge. If a witness does not compear, at the day affixed by the

the warrant of citation, a second warrant is granted of the nature of a caption, containing a command to messengers, to apprehend and bring him before the court. Where the party to whom a proof is granted, brings none within the term allowed by the warrant, an interlocutor is pronounced, circumducing the term; and decerning against him for not proving: [the word *circumduce* is used nearly in the same sense, l. 73. §. 1. 2. *de judic.*] Where evidence is brought, if it be upon an act, the Lord ordinary on the acts, after the term for proving is elapsed, declares the proof concluded; and prepares a state of the case which must be advised by the whole Lords; if it is upon an incident diligence, the import of the proof is advised by the ordinary in the cause.

Circum-
duction
for not
proving.

Conclu-
ded cause.

18. Where facts do not admit a direct proof, presumptions are received as evidence, which in many cases make as convincing a proof as the direct. Presumptions are consequences deduced from facts known or proved, which infer the certainty, or at least a strong probability, of another fact to be proved. This kind of probation is therefore called artificial, because it requires a reasoning, to infer the truth of the point in question, from the facts that already appear in proof. Presumptions are either, 1. *juris et de jure*; 2. *juris*; or 3. *hominis* or *judicis*. The first sort takes place, where statute or custom establishes the truth of any point upon a presumption; and it is so strong, that it rejects all proof that may be brought to disprove it in special cases. Thus, the testimony of a witness, who forwardly offers himself without being cited, is from a presumption.

Presum-
ptions.

*Juris et de
jure.*

sumption of his partiality rejected, let his character be ever so fair: in the same manner, a minor, as he is by law presumed incapable of conducting his own affairs, is, from that presumption, disabled from acting without consent of his curators, tho' he should be known to behave with the greatest prudence: many such presumptions are fixed by statute, 1592. c. 145.—1621. c. 18,—1690. c. 21. &c.

Juris.

19. *Præsumptiones juris* are these which our law-books or decisions have established, without founding any particular consequence upon them, or statuting *super præsumpto*. Most of these are not proper presumptions inferred from positive facts, but are founded merely on the want of a contrary proof: thus, the legal presumptions for freedom, for life, for innocence, &c. are in effect so many negative propositions, that servitude, death and guilt are not to be presumed, without evidence brought by him who makes the allegation. All of them, whether they be of this sort or proper presumptions, as they are only conjectures formed from what commonly happens, may be elided, not only by direct evidence, but by other conjectures, affording a stronger degree of probability to the contrary. *Præsumptiones hominis* or *judicis*, are these which arise daily from the circumstances of particular cases; the strength of which is to be weighed by the judge.

Judicis.

Fictio juris.

20. A *fictio juris* differs from presumption. Things are presumed, which are likely to be true; but a fiction of law assumes for truth, what is either certainly false, or, at least, is as probably false as true. Thus an heir is feigned or considered

considered in law, as the same person with his predecessor; thus also, writings against which certification is obtained in a reduction-improbatum, are adjudged to be false, *fictione juris*; tho' the most convincing proof should be brought, that they are genuine. Fictions of law must, in their effects, be always limited to the special purposes of equity, for which they were introduced, see 4. 1. 5.

TIT. 3. Of Sentences and their Execution.

PROPERTY would be most uncertain, if debatable points might, after receiving a definitive judgment, be brought again into question, at the pleasure of either of the parties: every state has therefore affixed the character of final, to certain sentences or decrees, which, in the *Roman* law are called *res judicatae*, and which exclude all review or rehearing. *Res judicatae.*

2. Decrees of the court of Session are either Decrees of *in foro contradictorio*, where both parties have the Session litigated the cause, or in absence of the defendant *in foro*. Decrees of the Session *in foro* cannot, in the general case, be again brought under the review of the court, either on points which the parties neglected to plead before sentence, (which we call competent and omitted) or upon points pleaded, and found insufficient, (proposed and repelled) 1672. c. 16. §. 19. But decrees, tho' *in foro*, are reversible by the court, where either they labour under essential nullities, e. g. where they are *ultra petita*, or not

In what cases, reduceable.

not conformable to their grounds and warrants, or founded on an error in calcul, &c.; or where the party against whom the decree is obtained, has thereafter recovered documents sufficient to overturn it, of which he knew not before, *St. 531. — Mackenzie. §. 1. b. t.*

Two consecutive interlocutors are final.

Time limited for appeals.

3. As, by our older forms, an unlimited liberty was given to parties, of reclaiming against the sentences of the court of Session, at any time before extracting the decree, no judgment was final till extract; but that liberty being now restrained, by *Act S. 26. Nov. 1718*, two consecutive interlocutors on the same point, tho' they cannot receive execution till extract, make the judgment final, as to the court of Session. And, by an order of the house of Peers, 24. *March 1725*, no appeal is to be received by them from sentences of the Session, after 5 years from extracting the sentence or decree, unless the person intitled to such appeal be minor, clothed with a husband, *non compos mentis*, imprisoned, or out of the kingdom. Sentences pronounced by the Lord ordinary have the same effect, if not reclaimed against, as if they were pronounced in presence; and all petitions against the interlocutor of an ordinary, must be offered within eight *federunt* days after pronouncing such interlocutor, *Act S. 9. July 1709*.

Decrees of the Session in absence are not *res judicatæ*.

4. Decrees in absence of the defender have not the force of *res judicatæ*; for, where the defender does not compear, he cannot be said to have subjected himself, by the judicial contract which is implied in *litis-contestation*: a party therefore may be reponed against these, upon paying to the other his costs in recovering them.

The

The sentences of inferior courts may be reviewed by the court of Session, before decree by advocation (1. 2. 20.), and after decree by suspension or reduction; which are likewise the two methods of opening such decrees of the Session itself, as can again be brought under review of the court.

5. Reduction (4. 1. 5.—18.) is the proper remedy, either where the decree has already received full execution by payment, or where it decerns nothing to be paid or performed, but simply declares a right in favour of the pursuer. Suspension is that form of law, by which the effect of a sentence condemnatory, that has not yet received execution, is stayed or postponed, till the cause be again considered. The first step towards suspension is a bill exhibited to the Lord ordinary on the bills. The bill, when the desire of it is granted, is a warrant for expeding letters of suspension which pass the signet: but, if the presenter of the bill neglects to expedite the letters, the Ordinary's deliverance lifts execution only for 14 days, *Act S. 3. July 1677*. Suspensions of decrees *in foro* cannot pass, but by the whole Lords in time of Session, and by three in vacation time; but other decrees may be suspended by any one Lord.

Sentences are reviewed either by reduction, Or suspension.

6. As suspension has the effect of staying the execution of the creditor's legal diligence, it cannot, in the general case, pass without caution found by the suspender to pay the debt, in the event it shall be found due, *Act S. 29. Jan. 1650*. Where the suspender cannot, from his low or suspected circumstances, find un-

Suspenders must find caution.

Juratory
caution.

In what
cases sus-
pension
cannot
pass on
caution.

Suspen-
sion, when
compe-
tent.

The sus-
pender
cannot
cite the
charger
upon his
letters.

questionable caution; the Lords admit juratory caution, *i. e.* such as the suspender swears is the best he can offer: but the reasons of suspension are, in that case, to be considered with particular accuracy, at passing the bill, *Act* 5. 8. *Nov.* 1682. The nature of the obligations, arising from this judicial cautionry, is explained, 3. 3. 28. Decrees, in favour of the clergy, of universities, or parish-school-masters, for their stipends, or salaries, cannot be suspended, but upon production of discharges, or on consignment of the sums charged for, 1669. *c.* 6. A charger, who thinks himself secure without a cautioner, and wants dispatch, may, where a suspension of his diligence is sought, apply to the Lords to get the reasons of suspension summarily discussed on the bill.

7. Though he, in whose favour the decree suspended is pronounced, be always called the charger, yet a decree may be suspended, before any charge is given on it. Nay, suspension is competent, even where there is no decree, for putting a stop to any illegal act whatsoever: thus, a building, or the exercise of any power which one assumes unwarrantably, is a proper subject of suspension. Letters of suspension bear the form of a summons, which contains a warrant to cite the charger; and it is likely that they were anciently used by way of summonses: but they have now of a long time, been considered, merely as a prohibitory diligence; so that the suspender, if he would turn provoker, must bring his action of reduction in common form; as was found in a suspension

suspension of the election of magistrates, *Feb.*
1722. *Magistrates of Edinburgh* against *Preston*.

If, upon calling the letters of suspension, the reasons are sustained, a decree is pronounced, suspending the letters of diligence on which the charge was given, *simpliciter*, which is called a decree of suspension, and has the same force with a reduction, as it takes off the effect of the decree suspended, to perpetuity. If the reasons of suspension are repelled; the Lords find the letters of diligence orderly proceeded, *i. e.* regularly carried on; and they ordain them to be put to further execution.

Decree of suspension

Decree finding the letters orderly proceeded.

8. Decrees are carried into execution, by diligence, either against the person or against the estate of the debtor. The first step of personal execution was anciently, by letters passing the signet, which were called letters of four forms, because the debtor was thereby charged to make payment, four times successively, each charge upon three days. By the fourth, he was charged either to pay the debt, or to enter himself in a certain prison named in the letters; and, if he did neither, within the days of the charge, the messenger was directed to denounce him rebel: so that the debtor had it in his power, to prevent his escheat from falling, by entering his person in prison. Letters of horning were first authorized to pass upon liquid debts, by 1584, c. 139.: but letters of four forms continued also in use, till 23. *Nov.* 1613; see *Sp. Pr.* p. 149, 150. Before horning could be issued, on the decree of an inferior judge, the decree behoved, by our former practice, to be judicially produced before the Lords, and their authority to be interposed

The execution of decrees.

Personal, by letters of four forms,

And by letters of horning.

Decree
conform.

posed to it, foresaid 1584. c. 139, by a new decree, which, because it was made out in the precise terms of the other, was called a decree conform: but now, letters, both of horning and of poynding, may be granted by warrant of the Lords on the decrees of magistrates of borrows, sheriffs, admirals and commissaries, 1593. c. 177.—1606. c. 10.—1609. c. 15.—1612. c. 7.—1661. c. 29.

Letters of
caption.

9. If the debtor does not obey the will of the letters of horning, within the days of the charge, the charger, after denouncing him rebel, and registrating the horning, (2. 5. 25.) may raise letters of caption, which contain a command, not only to messengers, but to magistrates, to apprehend and incarcerate the debtor. All messengers and magistrates, who refuse their assistance in executing the caption, are liable *subsidiariè* for the debt; and such subsidiary action is supported by the execution of the messenger employed by the creditor, bearing that they were charged to concur, and would not. By magistrates are here understood, only such as law obliges to have sufficient prisons for receiving debtors or criminals, as sheriffs or magistrates of royal borrows: hence, a baillie, in a burgh of barony, cannot be charged to execute a caption, 21. *March* 1627, *E. Cassils*. Letters of caption contain an express warrant to the messenger, in case he cannot get access, to break open all doors, and other lockfast places, where he is to search.

What persons secured against caption.

10. Law secures Peers and married women against personal execution by caption, upon civil debts. Pupils are secured by special statute, 1696. c. 41. No caption can be executed

ted against a debtor, within the precincts of the King's palace of *Holyroodhouse*; and some are of opinion, that, before the union of the two crowns, the persons of debtors were protected from diligence, by their attendance at the court of the sovereign, where-ever it happened to be kept: but this privilege of sanctuary afforded no security to criminals, as that did, which was, by the canon law, conferred on churches and religious houses. The King's castles are not intitled to this privilege, *F. v. 2. 218.* Caption may be stayed without suspension, where the personal presence of the debtor is necessary in any of our supreme courts, either as a witness or otherways; in which case, the judges are impowered to grant him a protection, for such few days as may be sufficient for making his appearance in court, and for his return, not exceeding a month in all, *1681. c. 9.—1698. c. 22.*

11. After a debtor is imprisoned, he ought not to be indulged by the magistrate or jailour the benefit of the air, either on his parole, or even under a guard; for creditors have an interest, that their debtors be kept under close confinement, that, by the *squalor carceris*, they may be brought to pay their debt. Nay, tho' the prisoner's state of health should require fresh air, the magistrate or jailor is liable to the creditor for the debt, if he suffers the prisoner to go abroad, without either a warrant from the court of Session, or an attestation upon oath, of his dangerous condition, by a physician, surgeon or the minister of the place, *Act S. 14. June 1671.* Magistrates

Prisoners must be closely confined.

Magistrates, when liable subsidiary for the debt.

are,

are, in like manner, liable for the debt *subsidiariè*, if they shall suffer the prisoner to escape, thro' the insufficiency of their prison, *Act S. 11. Feb. 1671*; but, if he shall escape under night, by the use of instruments, or by open force, or by any other accident which cannot be imputed to the magistrates or jailor, they are not chargeable with the debt; provided they shall have, immediately after his escape, made all possible search for him.

Form of
liberating
a prisoner.

Regularly, no prisoner for debt, tho' he should have offered payment, could be liberated without letters of suspension, issuing from the King's signet, and containing a charge to the jailour to set him at liberty; because the creditor's discharge could not take off the penalty incurred by the debtor for contempt of the King's authority; see 2. 5. 25. But, to save unnecessary expence to creditors, in small debts, jailours were, by *Act S. 5. Feb. 1675*, empowered to liberate prisoners, where the debt does not exceed 200 merks *Scots*, upon production of a discharge, in which the creditor consents to his liberation.

Liberati-
on upon
*cessio bono-
rum*.

12. Our law, from a consideration of compassion, allows insolvent debtors to apply for liberation from prison, upon a *cessio bonorum*, i. e. upon their making over to the creditors, all their estate, real and personal. This must be insisted for, by way of action, to which all the creditors of the prisoner ought to be made parties. The prisoner must, in this action, which is cognoscible only by the court of Session, exhibite a particular inventory of his estate, and make oath that he has no other estate than is therein contained, and that he has

has made no conveyance of any part of it since his imprisonment, in prejudice of his creditors. He must also make oath, whether he has granted any disposition of his effects before his imprisonment, and must condescend on the persons to whom, and on the cause of granting it; that the Lords may judge, whether, by any collusive practice, he has forfeited his claim to liberty.

13. A fraudulent bankrupt is not allowed this privilege; nor a criminal, who is liable in an assythment, to the party injured or his executors, *F. v. 2. 230*; even tho' the crime itself should be extinguished by a pardon, *ibid.* A disposition granted on a *cessio bonorum* is merely in further security to the creditors, not in satisfaction or *solutum* of the debts. If therefore the debtor shall acquire any estate after liberation, such estate may be attached by his creditors, as if there had been no *cessio*, except in so far as is necessary for his subsistence, *l. 4. pr. de cess. bon.*—*2. Att. c. 7. §. 3.* Debtors, who were liberated on a *cessio bonorum*, behoved to wear a habit proper to dyvours or bankrupts. The Lords are, by 1696, *c. 5.* discharged from dispensing with this mark of ignominy, unless in the summons of *cessio*, it be libelled, sustained and proved, that the bankruptcy proceeds from misfortune; and bankrupts are decerned to submit to the habit, even where no suspicion of fraud lies against them, if they have been dealers in any illicite trade, *Mill. 4.*

Dyvour
habit.

14. Where a prisoner for debt declares up-
on oath, before the magistrate of the jurisdiction, that he has not wherewith to aliment him-
self, Indigent
prisoners
must ei-
ther be a-
limented,

Or liberated on the act of grace.

self, the magistrate may, by 1696, *c.* 32, set him at liberty, if the creditor, in consequence of whose diligence he was imprisoned, does not alimnt him, within ten days after intimation made for that purpose. But the magistrate may, in such case, detain him in prison; if he chuses to bear the burden of the alimnt, rather than liberate him, 20. *Feb.* 1713, *Grierson*. This statute, which is usually called the act of grace, is limited to the case of prisoners for civil debts: no prisoner therefore can claim the benefit of it, who is committed, either for not performing a fact in his own power, *F. 2. Dec.* 1709, *Ross*, or for not paying a mulct or damages arising *ex delicto*, 23. *Nov.* 1738, *Maclesty*.

Execution against the debtor's estate.

15. Decrees are executed against the moveable estate of the debtor, by arrestment or poynding, *B. 3. T. 6*; and against his heritable estate, by inhibition, *B. 2. T. 11.* or adjudication, *B. 2. T. 12.* Letters of poynding, as well as of horning, may be issued by warrant of the court of Session, on the decrees of inferior judges, 1661, *c.* 29. A messenger employed in poynding, has no power to break open doors; but if he returns an execution that access was denied him, letters will be issued of course, giving him that power, which are called, letters of open doors. If one be decerned in a removing or other process, to quit the possession of lands, and refuses it, he may, for his disobedience, be denounced rebel; after which, letters of ejection may be raised, ordaining the Sheriff to eject him, and to enter the obtainer of the decree into possession. Where the party still continued to possess in spight

Letters of ejection.

spight of law, the Scots privy council, while that court subsisted, granted letters of fire and sword, empowering the Sheriff to dispossess him by all the methods of force; but, by our present practice, where one opposes by violence, the execution of a decree or of any lawful diligence, which the civil magistrate is not able by himself and his officers to make good, the execution is enforced *manu militari*.

16. A decret arbitral, which is a sentence proceeding on a submission to arbiters, has some affinity with a judicial sentence, tho' in most respects the two differ. A submission is a contract entered into, by two or more parties who have disputable rights or claims, whereby they refer their differences to the final determination of an arbiter or arbiters, and oblige themselves to acquiesce in what shall be decided. Where there are two or more arbiters, an oversman is commonly named in the submission, to whom power is given to determine, in case the arbiters cannot agree in the sentence; and sometimes the nomination of the oversman is left to the arbiters: but in either case, the oversman has no power to decide, unless the arbiters differ in opinion; for the power of decision is given in the first place to them, *Dalr. 30. Nov. 1716, Gordon.* Where the day within which the arbiters are to decide is left blank in the submission, practice has limited the arbiters power of deciding to a year. As this has proceeded from the ordinary words of style, empowering the arbiters to determine betwixt and the day of next to come; therefore where a submission is indefinite, without specifying any time, it ought, like any other

Decrees
arbitral.

Submissi-
on.

Overs-
man.

How long
submissi-
ons are
obligato-
ry.

contract or obligation to subsist for forty years. And on this ground, a bond obliging the granter, to submit debateable claims to certain persons, is perpetual, and productive of an action at any time within the years of prescription, 25. *Feb.* 1639, *Hay.*—3. *Feb.* 1669, *Boswal.* Submissions, like mandates, expire by the death of any of the parties submitters, see 25. *Feb.* 1630, *Hay.*

Can arbiters be compelled to decide.

Arbiters have no jurisdiction; and so cannot grant warrant for citing witnesses.

Nor execute their own sentences.

17. Formerly, arbiters who had accepted of a submission, might have been compelled by letters of horning to pronounce sentence; which proceeded from the style in which submissions were then executed, by which not only the parties, but the arbiters, consented to the registration of the submission, in order to diligence. As this part of style is now omitted, it may be doubted, whether an arbiter who has accepted of the office, may, like a mandatary, throw it up at pleasure, see *F.* 30. *June* 1699, *Chiefly*, and *l.* 3. §. 1. *de rec. arb.* This is certain that he cannot now be forced by summary diligence, to decide. As arbiters are not vested with jurisdiction, they cannot compel witnesses to make oath before them, or havers of writings to exhibit them: but this defect is supplied by the Lords of Session, who at the suit of the arbiters, 6. *Jan.* 1670, *Ker*, or of either of the parties, *F.* 26. *June* 1696, *Stevenson*, will grant warrant for citing witnesses, or for the exhibition of writings. For the same reason, the power of arbiters is barely to decide; the execution of the decree belongs to the judge. Where the submitters consent to the registration of the decret arbitral, performance may be enforced by summary diligence.

18. The

18. The power of arbiters is wholly derived from the consent of parties. Hence, where their powers are limited to a certain day, they cannot pronounce sentence after that day; tho' they may *in ipso termino*, i. e. on the very day, betwixt and which, the parties impowered them to decide, *F. 30. June 1694, Wilson*: nor can they decern parties in a penalty, higher than that which they have agreed to in the submission, *24. Feb. 1739, Creditors of Baughan*. And where a submission is limited to special claims, sentence pronounced on subjects not specified in the submission, is null, as being *ultra vires compromissi*.

They cannot exceed the powers given them by the submission.

19. But on the other part, as submissions are designed for a most favourable purpose, the amicable composing of differences, the powers thereby conferred on arbiters, receive an ample interpretation. For this reason, a general submission of all questions in debate between the parties, imports a power to the arbiters, to decide upon claims, not only of moveable subjects, but of heritable, *15. Dec. 1631, Kincaid*. Hence also, where arbiters in a special submission, decern mutual general discharges to be granted *hinc inde*, the decree is nevertheless valid, in as far as it relates to the claims specified in the submission; and the effect of the general discharge is by a favourable interpretation restricted to these claims, *F. 25. Dec. 1702, Craufurd*. In like manner, tho', by the *Roman* law, a decret arbitral, which decided only part of the claims submitted, and left the rest open, was null, *l. 25. pr. et §. 1. de rec. arb.* such partial decree is effectual by our customs, *20. March 1630, Stark*:

The powers of arbiters are amply interpreted.

Stark: yet to prevent cavilling, where it is intended to give that power to arbiters, it is, by the present style, specially expressed in the submission. Where the submitters have mutual claims against one another, a decret arbitral which determines only these on one side, and leaves all on the other undetermined, is null, 30. *June 1625, Falconer*; for it cannot be presumed to be the meaning of parties, that one shall have the benefit of a final decision, on the claims competent to him, while the other is left to make good his, by a law suit.

Decrees
arbitral
not reduc-
ible on
iniquity.

20. Our more antient law, by which decrees arbitral might be reduced on the iniquity of the sentence, or enorm prejudice of the party, defeated the principal design of submissions, viz. the cutting off of law suits, and was hardly reconcilable to the express compact of the submitters, by which they agree to acquiesce in the decision of the arbiter, *l. 27. §. 2. de rec. arb.*: but, by *Reg. 1695, §. 25*, decrees arbitral are declared not reducible upon any ground, except corruption, bribery or falsehood.

TIT. 4.

TIT. 4. *Of Crimes.*

THE word crime, in its most general sense, Crimes, includes every breach, either of the law of God, or of our country: in a more restricted meaning, it signifies such transgressions of law, as are punishable by courts of justice. Crimes were, by the *Roman* law, divided into public and private. Public crimes were these Public, that were expressly declared such, by some law or constitution, *l. 1. de publ. judic.* and which, because of their more atrocious nature, and hurtful consequences, might be prosecuted by any member of the community, *§. 2. Inst. eod.*

1. Private crimes were these which could be And pri-
pursued only by the party injured, and were vate.
generally punished, by a pecuniary mulct to be applied to his use. By the law of *Scotland*, no private party, except the person injured or his next of kin, can accuse criminally: but the King's Advocate, who, in this question, represents the community, has a right to prosecute all crimes in *vindictam publicam*, tho' the party injured should refuse to concur. Smaller offences, as petty riots, injuries, &c. which do not challenge the public vengeance, pass generally by the appellation of delicts, and are punished, only by a small pecuniary mulct, or a short imprisonment.

2. It is of the essence of a crime, that there Dole is
be an intention in the actor to commit it; for essential to
an action, in which the will of the agent has no crimes.
part,

Yet negligence is in some cases punishable.

Involuntary actions.

Actions committed by idiots.

Actions committed in drunkenness.

Infants cannot commit crimes.

Can pupils commit them?

part, is not a proper object, either of rewards or punishments: hence arises the rule, *crimen dolo contrahitur*. Simple negligence does not therefore constitute a proper crime, *l. 7. ad leg. Corn. de fizar.*: yet negligence may, in some cases, be so gross and supine, as to presume dole, *l. 11. de incend. ruin. naufr.* Far less can we reckon in the number of crimes, involuntary actions, the first cause of which is not in the agent; or these committed by an idiot or furious person: but lesser degrees of fatuity, which only darken reason, will not afford a total defence, tho' they may save from the *pæna ordinaria*. Actions committed in drunkenness are not, as to this question, to be considered as involuntary, seeing the drunkenness itself, which was the first cause of the action, is both voluntary and criminal.

3. On the same principle, such as are in a state of infancy, or in the confines of it, are incapable of a criminal action; dole not being incident to that age, *l. 12. ad leg. Corn. de fizar.* The Roman law asserts, in general, that crimes are not imputable to pupils, *l. 22. pr. ad leg. Corn. de fals.*; but the precise age at which a person becomes capable of dole, being fixed neither by nature nor by statute, must be gathered by the judge, as he best can, from the understanding and manners of the person accused. Where the guilt of a crime arises chiefly from statute, the actor, if he is under puberty, can hardly be found guilty; but, where nature itself points out its deformity, he may, if he is *proximus pubertati*, be more easily presumed capable of committing it: yet, even

even in that case, he will not be punished *pæna ordinariâ*.

4. One may be guilty of a crime, not only Accessories by perpetrating it himself, but by being accessary to a crime committed by another; ^{or art and part.} which last, is, by civilians, styled, *ope et consilio*, l. 50. §. 3. *de furt.*; and, in our lawphrase, art and part. A person may be guilty, art and part, either by giving mandate or advice to commit the crime, or directing how to execute it, or giving actual aid to the criminal. A bare advice does not seem, by the Roman law, to have inferred guilt, l. 36. *pr. de furt.*; contrary to the practice of most other nations. It is generally agreed by doctors, that, in the more atrocious crimes, the adviser is equally punishable with the criminal: in lesser, the punishment ought to be mitigated, according to the degree of the accession. One who gives mandate to commit a crime, as he is the first spring of action, seems still more highly criminal, than the person employed as the instrument in executing it: yet the actor cannot excuse himself, under the pretence of orders which he ought not to have obeyed. How far the commands of a superior may, in certain cases, either free intirely from punishment, or soften it, is explained by Sir George Mackenzie, *Crim. Treat. Tit. Art and Part.* §.

4. 5. 6.

5. Assistance may be given to the committer of a crime, not only in the actual execution, but previous to it, by furnishing him with poison, arms or the other means of perpetrating it: but, if the assister had no reason to believe, that these instruments were intended for

Or assister.

a criminal purpose, no guilt can be inferred against him. That sort of assistance, which is not given till after the criminal act, and which is commonly called *abetting*, tho' it is, of itself criminal, does not infer art and part of the principal crime; as if one should favour the escape of a criminal, knowing him to be such, or conceal him from justice. But, if previous to the commission of the crime, one should promise protection to the criminal, it will involve both in equal guilt. In theft, the simple harbouring of the criminal, after committing the crime, is, by special statute, punishable as theft, 1567. c. 21.

Crimes
punished
capitally.

Arbitrary
punish-
ment ne-
ver ex-
tended to
death.

6. These crimes that are, in their consequences, most hurtful to society, are punished capitally, or by death: others escape with a lesser punishment, sometimes fixed by statute, and sometimes arbitrary, *i. e.* left to the discretion of the judge, who may exercise his jurisdiction, either by fining, imprisonment, or a corporal punishment. Where the punishment is left, by law, to the discretion of the judge, he can, in no case, extend it to death; for, where the law intends to punish capitally, it says so in express words, and leaves no liberty to the judge to modify; but where, in any of our ancient laws, *L. B. 132.—1457. c. 77, &c.* the life of the offender is put in the mercy or will of the King, it is probable that the judge, in place of pronouncing sentence himself, left it to the Sovereign; who inflicted, sometimes a capital, sometimes a lesser punishment on the person guilty, according to his merit.

merit. The single escheat of the criminal falls on conviction in all capital trials, tho' the sentence should not express it; for, if the bare non-compearance in a criminal prosecution draws this forfeiture after it, (2. 5. 26. 27.) much more ought the being convicted of a capital crime, to infer it. One convicted of a capital crime loses his single escheat.

7. Treason, *crimen majestatis*, is that crime which is aimed against the Majesty of the state; and it can be committed only by these who are subjects of that state, either by birth or residence. It was high treason, by the law of *Scotland*, to intend the King's death, to lay any restraint on his person, or intice any foreign power to invade his dominions, 1662. c. 2. to rise or continue in arms, maintain forts, or make treaties with foreign states, without his authority, 1661. c. 5. Certain facts, tho' not in their nature treasonable, were declared, by statute, punishable as treason, and therefore got the name of statutory treason, viz. theft by landed men, 1587. c. 50, murder under trust, *ibid.* c. 51, wilfully setting fire to coal-heughs, 1592. c. 146, or to houses or corns, 1528. c. 8, and assassination, 1681. c. 15. Treason was punished by death, and by the forfeiture to the crown, of the traitor's estate, both real and personal: but this forfeiture did not cut off the right of the creditors, tacksmen, superiours, vassals, heirs of intail or widow of the forfeiting person, 1690. c. 33. Treason might, by our law, have been tried after the death of the traitor, and, sentence condemnatory upon such trial, carried the estate to the fisk; 1540. c. 69; which was indeed agreeable to the *jus novum* of the *Romans*. Treason what, by the law of *Scotland*.

Statutory treason.

High treason might be tried after death.

l. 8. *pr. C. ad leg. Jul. maj.* ; but contrary to the rules of law, and dictates of humanity.

8. Soon after the union of the two kingdoms in 1707, the laws of treason that were then in force in *England*, were made ours, by 7^{mo} *An. c. 21.* not only with regard to the facts constituting that crime, but also in relation to the forms of trial, the corruption of blood, and all the penalties and forfeitures consequent upon it. By this statute, the facts that inferred statutory treason by our former law, are declared simply capital crimes.

Treason
what, by
the law of
England.

9. It is high treason, by act 25^{mo} *Edw. III. c. 2.* to imagine the death of the King, Queen consort, or of the heir apparent of the crown ; to levy war against the King, or adhere to his enemies ; to counterfeit the King's coin, or his great or privy seal ; or to kill the chancellor, treasurer, or any of the twelve judges of *England*, while they are in their places, doing their offices : which last point of treason, is, by the act before cited, 7^{mo} *An.* applied to *Scotland*, in the case of slaying any Lord of Session or of Justiciary, sitting in judgment. These who wash, clip or lighten the proper money of the realm, 5^{to} *Eliz. c. 11.* — 18^{vo}. *Eliz. c. 1.* ; who advisedly affirm, by writing or printing, that the Pretender has any right to the crown, or that the King and parliament cannot limit the succession to it, 6^{to} *An. c. 7.* or who hold correspondence with the Pretender, or any person employed by him, 13th *Gul. III. c. 3.* are also guilty of treason.

10. The forms of proceeding, in the trial of treason, whether against Peers or commoners, are set forth in a small treatise, published by order

order of the house of Lords, in 1709, sub-
joined to a collection of statutes concerning
treason. By the conviction upon this trial, the
whole estate of the traitour forfeits to the
crown. His blood is also corrupted, so that,
upon the death of a predecessor, he cannot in-
herit; and the estate which he cannot take,
falls, not to the crown by forfeiture, but to
the immediate superior, as escheat, *ob defe-*
ctum hæredis, without distinguishing whether
the lands hold of the crown or of a subject.
By the act 7^{mo} An. it is provided, that no
attainder for treason, shall, after the death of
the pretender, extend to the hurting of the
right of any person, other than the right of the
offender, during his natural life; but this pro-
vision, by a posteriour statute, 17^{mo} Geo. II.
c. 39. is not to take place, as long as any of
the sons of the pretender is alive. It was, for
sometime, doubted, whether the act 1690. c.
33. saving the rights of heirs of entail, credi-
tors, &c. was repealed by the statute, 7^{mo} An.
subjecting persons convicted of high treason, in
Scotland, to the pains and forfeitures contain-
ed in the *English* law; since the excluding of
creditors is not properly a penalty upon the
traitour; and the 18th article of union declares
our private rights unalterable, except for the
evident utility of the subject, which article
might seem to require an express repealer: see
farther report of commissioners of inquiry, 1719.
p. 15. 21. 23. &c. But it is now laid down
as an agreed principle, that the rights, even of
third parties, in cases of forfeiture on treason,
must be determined by the law of *England*;
and they cannot be explained with any exact-
ness,

Conviction, upon
high treason, infers
forfeiture
of estate,
and corrup-
tion of
blood.

The law
saving the
rights of
creditors
and heirs
of entail,
&c. re-
pealed.

ness, but by one who has made that law his special study.

Misprision
of treason.

11. Misprision of treason, from *meprandis*, is the over-looking or concealing of treason. It is inferred by one's bare knowledge of the treason, and not discovering it to a magistrate or other person, intitled by his office to take examinations; tho' he should not, in the least degree, assent to it. The before quoted act, *7mo An.* makes the *English* law of misprision ours. Its punishment, by that law, is perpetual imprisonment, together with the forfeiture of the offender's moveables, and of the profits of his heretable estate, during his life, *Hale. Plac. Cor. v. 1. c. 28.*

Blas-
phemy.

12. The crime of blasphemy, under which may be comprehended atheism, consists in the denying or vilifying the Deity, by speech or writing. Blasphemers were punished capitally, both by the *Jewish* law, *Lev. xxiv. 16* and the *Roman*, *Nov. 77*. These who curse God, or any of the persons of the blessed Trinity, are, by our law, *1661. c. 21*, to suffer death, even for a single act; and these who deny him, if they persist in their denial. This statute is ratified by *1695. c. 11*, which also makes the denial of a providence, or of the authority of the holy Scriptures, criminal, and punishable capitally for the third offence. Next to the duty we owe to God, is that which we owe to our parents, and, which our law has so strongly enforced, that the cursing or beating of them infers death, if the person guilty be above 16 years of age; and an arbitrary punishment, if he is under it, *1661. c. 20.*

13. Murder

13. Murder is the wilful taking away of a Murder, person's life, without a necessary cause. The distinction, which obtained, by our ancient law, between slaughter premeditated, or upon *forethought felony*, and that which was committed on a sudden, or *chaudmella*, indulging to the last, the privilege of girth and sanctuary, *St. Ro. II. c. 9. 1335. c. 31.* was taken off, by *1661. c. 22.* (copied after *1649. c. 19.*) which supposes homicide to be a capital crime, without any such distinction. Casual homicide, where the actor is, in some degree, blameable, and homicide, in self-defence, where the just bounds of self-defence have been exceeded, are punished arbitrarily, by this act: but the slaughter of night-thieves, of house-breakers, of these who are assisting in masterful depredations, or of rebels denounced for capital crimes, may be committed with impunity. The crime of demembration is joined with that of man-slaughter or murder, *1491. c. 28.*; but, in practice, the punishment of demembration has been restricted to confiscation of moveables, and an assythment, *i. e.* an indemnification to the party for his damages. Sheriffs judge in murder, tho' it be one of the pleas of the crown, *1426. c. 90. 1491. c. 28.* When the murderer was taken red-hand, *i. e.* apprehended in the criminal act, the sheriff behoved not only to try him, but to execute the sentence within three suns: whereas, if he was apprehended *ex intervallo*, forty days were allowed for that purpose; see the before quoted acts. It was afterward provided, by *1695. c. 4.* that, in all cases where the sheriff was tied down to do justice in three suns, sentence

sentence might be executed at any time within nine days, provided it had been pronounced within three : but now, all criminal judges not only may, but must suspend the execution of capital sentences, for a longer time, see below, §. 62.

Self-murder.

14. Self-murder is in its own nature as highly criminal, as the putting our neighbour to death ; and therefore, tho' the person of the offender is, after death, no longer the object of punishment, the other penalties of murder take place ; and consequently, the single escheat of a self-murderer falls to the King, or his donatary. To ascertain this right, the donatary must bring his action, to which the nearest of kin of the deceased must be made a party, for proving and declaring the self-murder : and this process must be pursued, not before the criminal court, but the Session ; in regard it is intended only *ad civilem effectum*, to procure the confiscation of moveables. The

Parricide.

punishment of parricide, or the murder of a parent, is not confined by our law to the criminal himself ; all his posterity in the right line, are declared incapable of inheriting, and the succession devolves on the next collateral heir, 1594. c. 220. There is a presumptive or statutory murder constituted by 1690, c. 21, by which, any woman who shall conceal her being with child, during the whole space of her pregnancy, and shall not call for, or make use of help in the birth, is to be reputed the murderer, if the child is dead or a misling. This statute was intended to discourage an unnatural practice, which nevertheless continues too frequent, of women making away with

Murder presumed by the mother's concealing her pregnancy.

with their children begotten in fornication, to avoid church censures.

15. Theft is defined a fraudulent intermeddling with the property of another, with a view of making gain or profit. Neither the law of *Moses*, nor of *Rome*, punished theft capitally. By the first, the thief was bound to restore, in some cases, five times the value, in others, less, *Exod. xxii. 1. et seqq.* and by the *Roman*, either the double or quadruple, according to the different circumstances attending the crime. Our ancient law proportioned the punishment of theft to the value of the goods stolen, hightening it gradually, from a slight corporal punishment to a capital, in case the value amounted to 32 pennies *Scots*, which in the reign of *D. I.* was the price of two sheep, *R. M. l. 4. c. 16. §. 3.—L. B. c. 121. §. 6.* In several of our later statutes, it is taken for granted, that this crime is capital, 1587, *c. 82.*—1606, *c. 5, &c.*; but where Pickery, the thing stolen is of small value, we consider it, not as theft, but pickery; which is punished sometimes corporally, and sometimes by banishment. The breaking of yards or orchards, and the stealing of green wood, is punished only by a pecuniary fine, which rises as the crime is repeated, 1579, *c. 84.*

16. Theft may be so aggravated as to be punished by death, tho' the value of the thing stolen be more trifling; as theft twice repeated, *L. B. c. 121, §. 5.* or committed in the night, *arg. 1661, c. 22.* or by landed men, or of things set apart for sacred uses, or theft attended with violence, (robbery) called in our ancient statutes, rief, 1477, *c. 78.* or stouth-rief, In What cases, theft is capital. Robbery or stouth-rief.

Black-
mail.

Egyptians
or gipsies.

Reset of
theft.

rieff, 1515, c. 2; under which last species of theft, may be comprehended forning, or the taking of meat and drink by force, without paying for it. Stouth-rieff came at last to be committed so audaciously, by whole bands of men associated together, that it was thought, at that time, necessary to vest all the free-holders of the kingdom, with a power of holding courts upon forners and rievvers, and executing them to the death, 1594, c. 227. Nay, the law punished capitally all who, to secure their lands from such depredations, paid to the rievvers a yearly contribution, which got the name of *black mail*, 1567, c. 21,—1587, c. 102. An act passed 1609, c. 13, commanding to banishment these forners that were called *Egyptians* or gipsies, and adjudging to death all that should be reputed or holden *Egyptians*, if found thereafter within the kingdom. Robbery committed on the seas is called piracy, and is punished capitally, 8vo Geo. I. c. 24, which statute sets forth the different facts that constitute this crime. The breaking of milns, the cutting of plough-graith in time of labouring, or of growing corns or timber, and the houghing or slaying of oxen or horses, are declared punishable by death as theft, 1587, c. 82.

17. The receivers and concealers of stolen goods, knowing them to be such, called resetters of theft, (*receptatores*) suffer as thieves, *St. Al. II. c. 21*: and these who barely harbour the person of the criminal, within 48 hours either before or after committing the crime, are punished as partakers of the theft, 1567, c. 21. These who sell goods belonging to thieves or lawless persons, who dare not

not themselves come to market, are punished with banishment and escheat of moveables, 1587, c. 109. Theft-bote, from *bate* a Saxon word signifying compensation, is the taking a consideration in money or goods from the thief, to liberate him from punishment, or procure his escape from justice. A Sheriff, or other judge guilty of this crime, forfeits his life and goods, 1436, c. 137; and by a posterior statute, even a private person who takes theft-bote, suffers as the principal thief, 1515, c. 2.

Theft-bote.

18. Adultery is the crime by which the marriage bed is polluted. This crime could, neither by the *Roman law*, l. 6. §. 1. *ad leg. Jul. de adul.* nor the *Jewish*, *Lev. xx. 10. Deut. xxii. 22.* be committed, but where the guilty woman was the wife of another: by ours, it is adultery, if either the man or woman be married. We distinguish between simple adultery, and that which is notour or manifest. Open and manifest adulterers, who continue incorrigible after the censures of the church, were punished, 1551, c. 20, by the escheat of moveables; but soon thereafter, by 1563, c. 74, the punishment of notour and manifest adultery was made capital. This crime is distinguished by one or other of the following characters; where there is issue procreated between the adulterers; or where they keep bed and company together, notoriously known; or where they give scandal to the church, and, notwithstanding admonition, refuse to abstain, and are for their obstinacy excommunicated, 1581, c. 105. The punishment of simple adultery is no where defined by statute, and is therefore left to the discretion of the judge:

Adultery.

Notour.

Simple.

but custom has made the falling of the single escheat, to be one of its penalties, *arg. 9. Jan. 1662, Baird.* Adultery being one of the occult crimes, may be proved by presumptions. When it is pursued only *ad civilem effectum*, for obtaining a divorce, more slender presumptions will be received; so that the same proof, that has been judged sufficient for procuring a divorce before the Commissaries, may be cast, if the crime should be afterwards prosecuted criminally.

Incest.

19. Incest is committed by persons who stand within the degrees that are forbidden by the book of *Levit. c. xviii*; and it is punished capitally, 1567, *c. 14.* The same degrees are forbidden in affinity, as in consanguinity, *Lev. xviii. 4, 14, 15, 16.* As this crime is repugnant to nature itself, it seems an ill founded opinion, that incest cannot be committed, but between persons born in lawful marriage; for in questions of the law of nature, all children, whether lawful or natural, stand on an equal footing: *civilis ratio civilia jura corrumpere potest; naturalia vero non utique.* It is true, that there can hardly be a legal proof of a relation merely natural, on the side of the father; but the mother may be certainly known without marriage.

Rape.

20. There is no explicate statute making rape or the ravishing of women, capital; tho, it is plainly supposed in act 1612, *c. 4,* by which, the ravisher is exempted from the pains of death, only in case of the woman's subsequent consent or declaration, that she went off with him, of her own free will: and even then, he is to suffer an arbitrary punishment, either

either by imprisonment, confiscation of goods, or a pecuniary mulct.

21. Duelling, *bellum inter duos*, is the crime Duelling. of fighting in single combat, upon previous challenges given and received. The singular combat was authorised by the *Gothic* polity, as a method of determining questions, both civil and criminal; but the act 1600, c. 12, declared the fighting in a duel, without licence from the King, punishable by death. (4. 2. 1.) This statute is ratified by 1696, c. 35, which further provides, that what person soever, principal or second, shall give a challenge to fight a duel, or shall accept a challenge, or otherwise engage therein, shall be punished by banishment and escheat of moveables, even tho' no actual fighting should ensue.

22. Falshood, in a large sense, is the fraudulent imitation or suppression of truth, to the Falshood. prejudice of another. The lives and goods of persons convicted of using false weights and measures were, by our old law, in the King's mercy; and their heirs could not inherit, but upon a remission, *L. B. 132*. The latest statute relating to this crime, 1607, c. 2, punishes it by confiscation of moveables. Using of false weights and measures.

23. That particular species of falshood, Forgery. which consists in the falsifying of writings, is distinguished by the name of forgery, and was, by the *Roman* law, punished capitally, where the atrocity of the fact required it, *l. 22. C. ad leg. Corn. de fals.* By our statute law, the punishment of this crime was, at first, the amputation of the hand, *St. Al. II. c. 19*; afterwards proscription, banishment and dismembering of the hand and tongue, joined with the

the other pains inflicted by the common law, 1551, c. 22; and at last, it is declared in general terms, to be the pains due to the committers of falshood, 1621, c. 22. Our practice has now of a long time, agreeably to the *Roman* law, made the crime capital, unless the forgery be of executions, or other writings of smaller moment; in which case, it is punished arbitrarily, *Feb. 1739; Macvicar.*

The use of
a falsewrit-
ting con-
stitutes
this crime.

24. The writing must not only be fabricated, but put to use or founded upon, in order to infer this crime. Any person who founds on a writing challenged upon falshood, may be put to declare judicially, whether he is willing to abide by it, as a true deed. If he declines to abide by it, the deed is declared forged; but he himself is not liberated upon his passing from it, if evidence be brought that he was accessory to the forgery, *l. 8. C. ad leg. Corn. de fals.* — 1621, c. 22. Frequently, the party who uses the deed, offers to abide by it *qualificatè*, or under protestation that it came fairly into his hands, and that he had no accessions to the crime. The immediate receiver of a writing must, in all cases, abide by it simply; but heirs and singular successors are sometimes allowed to do it under a quality, the import of which, is to be afterwards considered by the judge.

If the n-
fer abides
by it.

Forgery,
before
what
court com-
petent.

25. The trial of forgery, tho' it be in the strictest sense criminal, is proper to the court of Session (1. 3. 11.); but where improbation is moved against a deed by way of exception, the inferior judge, before whom the action lies, is competent to it, *ad civilem effectum*, arg. 1557, c. 62. The proposer of improbation,

either

either by way of action or exception, was, by 1557, c. 62, obliged to find caution to pay a certain sum at the discretion of the judge, in case he should succumb in his allegation; afterwards, by an act Sed. mentioned in B. Sed. 8. Jan. 1583-4, in place of giving security for the sum modified, he was to consign it: but these acts are now quite in disuetude, where the improbation is undertaken by way of action. When it is moved by way of exception, our practice, to discourage affected delays, obliges the defender who moves it, to consign *L. 40 Scots*; which he forfeits, if his allegation of falshood shall appear calumnious.

Consignation in improbation.

26. The proof in improbations is either direct or indirect. The first is, by the testimony of the writer of the deed, and of the witnesses who attest it, called the instrumentary witnesses. A proof by the indirect manner, is gathered from circumstances and extrinsic arguments. If one of the two instrumentary witnesses should depose that the writing is true, and the other that he did not attest it, the writing will be declared void, or improbative, being supported by the testimony of one witness only; but the user will not be subjected to the pains of falshood, in regard he is justified by the oath of that witness. Where witnesses attest a deed, without knowing the granter and seeing him subscribe, or hearing him own his subscription, the deed is not only improbative, but such witnesses are declared accessory to forgery, 1681, c. 5: yet as this sort of accessi-
 on is merely statutory, the punishment ought to be restricted at the discretion of the judge. The circumstances by which forgeries are most

Proof in improbations.

Direct.

And indirectly.

frequently discovered in the indirect way are, *comparatione literarum*, i. e. by comparing the hand-writing of the writer of the deed, or the subscription of the granter, as it stands in other genuin writings, with that which appears in the deed quarrelled; by the manner of spelling; by the agreement or disagreement of the style of the deed, with that of the age in which it is said to have been executed; by the stamp of the paper, and sometimes by the falseness of the date, or by a proof that the alleged granter was not, at the date of the writing, in that place where it bears to have been signed, which last is called *alibi*.

Forgers, when the court of Session, is by them remitted to the Justiciary, (1. 3. 11.) an indictment is exhibited against him, and a jury or assize sworn, before whom the Lord's decree is produced in place of all other evidence of the crime; in respect of which, the assize finds the pannel guilty: so that the decree of Session, being pronounced by a competent court, is considered as full proof, or, in the style of the bar, as *probatio probata*.

Perjury. 28. Perjury, which is the judicial affirmation of a falsehood upon oath, really constitutes the *crimen falsi*; for he who is guilty of it, does, in the most solemn manner, substitute falsehood in the place of truth. In order to constitute this crime, the violation of truth must be deliberately intended by the swearer; and therefore reasonable allowances ought to be given to forgetfulness or misapprehension, according to his age, health and moral character. The breach of a promissory oath does not

not infer this crime ; for he who promises upon oath, may sincerely intend performance when he swears, and so cannot be said to call upon God to attest a falsehood. Tho' an oath, however false, if made upon reference in a civil question, concludes the cause, yet the person perjured is liable to a criminal prosecution ; for the effect of the reference, can go no further than the private right of the parties.

29. Notwithstanding the mischievous consequences of perjury to society, it is not punished capitally, either by the *Roman law*, l. 13. *C. de test.* or by ours. The special punishment of swearing falsely on an affize, was confiscation of moveables, imprisonment for a year, and infamy, *R. M. l. i. c. 14* : which punishment, came, in the course of time, to be transferred to perjury in general, with a small variation, 1555. c. 47. The court of Session is competent to perjury *incidenter*, when, in any examination upon oath, taken in a cause depending before them, a person appears to have sworn falsely : but, in every other case, the trial of the crime is proper to the court of Justiciary. Subornation of perjury consists in the tampering with these who are to swear in judgment, by soliciting or directing them how they are to depose ; and it is punished with the pains of perjury, 1555. c. 47.

Its punishment.

Before whom competent.

Subornation of perjury.

30. Bigamy, which is a species of perjury, is a person's entering into the engagements of a second marriage, in violation of a former marriage-vow still subsisting. Bigamy, on the part of the man, has been tolerated in many states before the establishment of christianity, even by the *Jews* themselves ; but it is discharged

Bigamy.

charged by the precepts of the gospel; and, it is punished, by our law, whether on the part of the man or of the woman, with the pains of perjury. 1551. c. 19.

Witch-
craft.

Telling of
fortunes.

Haimsuc-
ken.

31. All persons who used witchcraft, sorcery or necromancy, or pretended skill therein, and all consulters of witches and sorcerers, were punished by death, 1563. c. 73. But, by act *9^{tho} Geo. II. c. 5.* no prosecution can be carried on, against any person, for witchcraft or conjuration: and all who undertake, from their skill in any occult science, to tell fortunes, or discover stolen goods, are to suffer imprisonment for a year, stand once every three months of that year in the pillory, and find such surety for their future good behaviour, as the judge shall direct.

32. Haimsuchen (from *haim* home, and *soecken* to seek or pursue, *Skene v. haimsucken*) is the assaulting or beating of a person in his own house. The punishment of this crime is no where defined, except in the books of the majesty, which makes it the same with that of a rape, *l. 4. c. 9, 10.* In order to infer this crime, the assault must be made in the proper house of the person assaulted, where he lies and rises daily and nightly, *ib. l. 1. c. 9. §. 1.* so that neither a public house, nor even a private, where one is only transiently, falls within the description of the law.

Sedition.

33. The crime of sedition consists in the raising of commotions or disturbances in a state; and it is either real or verbal. The first sort is commonly committed, by convoking together any considerable number of persons, without lawful authority, under pretence

of

of redressing some supposed grievance, to the disturbing of the public peace. These who are convicted of this crime, are punished by the confiscation of their goods, and their lives are to be at the King's will, 1457. c. 77. Where the convocation is made in a warlike manner, it is punished capitally, 1563. c. 75. For preventing rebellious riots and tumults, it was enacted by 1mo Geo. I. c. 5. that if any persons, to the number of twelve, shall assemble, and, being required by a magistrate or constable to disperse, shall nevertheless continue together for an hour after such command, the persons disobeying shall suffer death, and the confiscation of moveables. Verbal sedition, or leasing-making, consists in the utter-^{Leasing}ing of words, tending to create discord be-^{making.}tween the King and his people. It was formerly punished by death, and forfeiture of goods, 1425. c. 43.—1540. c. 83.; but now, either by imprisonment, fine or banishment, at the discretion of the judge, 1703. c. 4.

34. Deforcement is the opposition given, or ^{Deforcement}resistance made, to messengers or other officers, ^{ment.}while they are employed in the execution of the law.

The Lords of Session are judges competent to this crime, 1581. c. 118.; and by the last statute relating to it, 1592. c. 150. it is declared punishable by the confiscation of moveables, one half to the King, the other, to the party at whose instance the diligence was raised. Where the deforcement is pursued, only *ad civilem effectum*, for recovery of the debt and damages, the process is in practice sustained, if the messenger should be any how hindered in the execution of the diligence, tho'

without the effusion of his blood : but, in a criminal trial, where the conclusion is penal, effusion of blood must be libelled, in terms of the act 1592. In the same manner, tho' the words of this statute are levelled, only against the debtor or persons commanded by him, our practice has extended it, where the conclusion of the process is merely civil, against these who officiously interpose to save their friend from diligence, without being desired by the debtor.

Who, ha-
bile wit-
nesses in
deforce-
ment.

The mes-
senger's
execution
of de-
force-
ment, how
far it
proves.

35. As to the proof of this crime, the persons employed by the officer to attest the execution, have the best opportunities of knowing the facts ; but these are, in some sort, parties, violence being commonly done in a deforcement, to them as well as to the messenger : nevertheless, that the proof of deforcement may not be rendered impracticable ; law considers the messenger as the alone party, against whom the violence is intended ; and therefore receives the testimony of the witnesses, tho' they should happen to be beat. The written execution of the messenger or officer is sufficient evidence of the deforcement, in all civil questions, concerning the validity of the diligence, till it be improbated : but, in a criminal question, moved against the deforcers upon the violence, the messenger's assertion, who is a party interested in the prosecution, is not regarded. Deforcement of the officers of the customs, by persons to the number of eight, or upwards, was punished by transportation, to *America*, for a term of years, not exceeding seven, 6to Geo. I. c. 21. §. 34 ; but now, by act 19no Geo. II. c. 34. armed persons, to the number

number of three or more, assisting in the illegal running, landing or exporting of prohibited or uncustomed goods, or any person who shall forcibly resist, wound, or maim any of the officers of the customs or excise, in the due execution of their office, shall suffer the pains of death, and the confiscation of moveables.

36. Breach of arrestment, (3. 6. 6.) is a Breach of crime of the same nature with deforcement, arrestment, as it imports a contempt of the law, and of the orders of our judges; and it is subjected to the same pains that were inflicted on deforcement, by 1581. c. 118.; viz. an arbitrary corporal punishment, and the escheat of moveables to the King; with a preference to the creditor for his debt, and for such farther sum as shall be modified to him by the judge.

37. Usury is the taking a higher rate of interest for the use of money, than is authorized by law. It is generally divided into *usura manifesta*, or direct; and *velata* or covered. One Direct. may be guilty of the first sort, either, where he stipulates to himself, by a clause in an obligation, more than the lawful interest on the loan of money; or where the interest is accumulated into a principal sum bearing interest, in case of not punctual payment; or where one receives the interest of a sum before it is due, seeing, in that case, he takes a consideration for the use of money, before the debtor has really got the use of it, 1621. c. 28. (see 3. 3. 33.) Where a creditor's payment is clogged with an uncertain condition, whereby he runs an hazard of losing his sum, he may stipulate to himself a higher interest than the legal, It has no place where the creditor undertakes any hazard.

Bonds of
bottomry.

gal, without the crime of usury; for, in such case, the interest is not given, merely in consideration of the use of the money, out of the danger undertaken by the creditor. Hence, one who gives money upon bottomry, the repayment of which, depends on the safe return of the ship on which the money is lent, may lawfully take a rate of interest proportioned to his risk.

Covered
usury.

38. Covered usury, is that which is committed under the appearance, not of a loan, but of some other contract, e. g. a sale or an improper wadset. Thus a back tack, which is given by a wadsetter to the reverser, (2. 8. 13.) for payment of a ~~tax~~ duty exceeding the legal interest of the sum lent, is considered as a contract of loan, tho' covered under the contracts of wadset and location, and consequently infers usury: and, in general, all obligations entered into, with an intention of getting more than the legal interest for the use of money, however they may be disguised, are declared usurious, by 1597. c. 247. As a further guard against this crime, the taking more than the legal interest for the forbearance of payment of money, merchandize or other commodities, by way of loan, exchange or any other contrivance whatsoever, or the taking a bribe for the loan of money, or for delaying its payment when lent, is declared usury, 12mo An. St. 2. c. 16.

Usury,
how pun-
ished.

39. The punishment of usury, was, by 1597. c. 247. declared to be the confiscation of moveables, the annulling the usurious contract, and a forfeiture of the principal sum delivered in consequence of it, with the law-
ful

ful annual rent due thereupon, to the King or his donatary; with the burden of restoring to the private party, in case he should concur in the prosecution, the sums unlawfully received by the creditor. But, by the above quoted act of *Q. Anne*, the usurious obligation is not only declared void, but the creditor, if he has received any unlawful profit, forfeits triple the sum, usuriously lent or bargained. Usury, where it is to be pursued criminally, must be tried by the court of Justiciary; but, where the libel concludes only the annulling of the debt or restitution, the Lords of Session are the proper judges.

40. In the probation of usury, law is forced to neglect some of its common rules, that the crime may be brought to light. Where the usury is founded on a written obligation in the hands of the defender, the pursuer may, by an exhibition, force the defender to produce the obligation, by which the crime may be proved against himself, contrary to the brocard, *nemo tenetur edere instrumenta contra se*; and where it is not founded on writing, the crime may be proved by the usurer's own oath, notwithstanding the rule, *nemo tenetur jurare in suam turpitudinem*, 1600. c. 7. But this act rejects the testimony of him who has given the unlawful profits, because he becomes a gainer, by the conviction of the usurer.

41. The buying of claims, concerning which a suit is depending, by any member, either of the college of justice or of an inferiour court, is punished by the loss of the delinquent's offices, and of all the privileges thereto belonging, 1594. c. 216.

42. Injury,

Injury.

Verbal,

42. Injury, in its proper acceptation, is the reproaching or affronting our neighbour. Injuries are either verbal or real. A verbal injury, when directed against a private person, consists in the uttering of contumelious words, with an intention to defame. The twitting of one with natural defects, tho' it be inhumane, does not seem to fall under this description, as these imply no real reproach in the just opinion of mankind. Though an intention to defame, or *animus injuriandi*, be, in the general case, presumed, from the injurious words themselves, yet special circumstances may elide the presumption. Thus one's informing against his neighbour, as a thief or disorderly person, to a magistrate; or his alledging in judgment, a crime against his adversary in his own defence, is no injury; if such information or plea does not appear calumnious. The truth of the injurious words, tho' it may alleviate the guilt, does not absolve intirely from punishment. The cognizance of this sort of injury is proper to the commissaries, who, as the *judices christianitatis*, are the only judges of scandal. It is punished, either by a pecuniary fine, which is proportioned, according to the condition of the persons injuring and injured, and the circumstances of time and place, l. 7. §. 8. *de injur.* or by publicly acknowledging the offence: and frequently the two are conjoined. The calling one a bankrupt, is not, in strict speech, a verbal injury, as it does not affect the person's moral character; yet, as it may hurt his credit in the way of business, it founds him in an action of damages

mages, which may be pursued before the Judge ordinary.

43. A real injury is inflicted by any fact, by And real; which a person's character or dignity is affected; as striking one with a cane, or even aiming a blow without striking, spitting in one's face, assuming a coat of arms or any other mark of distinction proper to another, &c. The composing and publishing defamatory libels may be likewise reckoned of this kind. Real injuries are tried by the Judge ordinary; and punished arbitrarily, either by fine or imprisonment.

44. The crime of *stellionate*, from *stellio*, Stellionate.
Plin, hist. nat. l. 30. c. 10. comprehends every fraud which is not distinguished by a special name; but is chiefly applied to conveyances of the same numerical right, granted by the proprietor to different disponees, *l. 3. §. 1. Stellion.*—1592, *c. 140.* The punishment of *stellionate* must necessarily be arbitrary, in order to adapt it to the various nature and different aggravations of the fraudulent acts, *l. 3. §. 2. Stellion.* The persons guilty of that particular species of it, which consists in granting double conveyances, are, by our law, declared infamous, and their persons and goods at the King's mercy, 1540, *c. 105.* The cognizance of fraudulent bankruptcy is appropriated to the Lords of Session, who may inflict Fraudulent bankruptcy.
any punishment on the offender that appears proportioned to his guilt, death excepted, 1696, *c. 5.*

45. Any party to a law suit who shall slay, Battery
wound or otherways invade his adversary, at *pendente*
any period of time, between executing the sum- *lito.*
mons,

mons, and the compleat execution of the decree, or shall be accessary to such invasion, shall lose his cause, 1584, c. 138.—1594, c. 219. Tho' these acts direct, that proof shall be previously taken of the invasion by the justice, or other competent judge; yet the Lords of Session sustain themselves judges, when the suit to which the trial relates, depends before their court. The sentence pronounced upon this trial, against him who has committed the battery, is by the statute not subject to reduction, either on the head of minority, or any other ground whatsoever; and if the person prosecuted for this crime, shall be denounced for not comparing to answer, his liferent, as well as single escheat, falls immediately after such denunciation.

Wron-
gous im-
prison-
ment.

46. The crime of wrongous imprisonment is particularly described, 1701, c. 6. It is inferred, by granting warrants of commitment in order to trial, proceeding on informations not subscribed, or without expressing the cause of commitment; by receiving or detaining persons on such illegal warrants; by refusing to a prisoner a copy of his warrant of commitment; by detaining him in close confinement above eight days after his commitment; by not liberating him upon offer of proper bail, where the crime is bailable; and by transporting persons out of the kingdom, without either their own judicial consent, or a lawful sentence; see below §. 48. The persons guilty of wrongous imprisonment, are punished by a pecuniary mulct, from 6000 down to 400 *L. Scots*, according to the quality or rank of the offender: and the judge, or other person who detains

detains a prisoner contrary to the directions of the statute, is over and above the pain of wrongous imprisonment, subjected to the payment of a certain sum, proportioned to the quality of the person detained, for each day of such detention, and is declared incapable of public trust. The penalties of this crime may be insisted for, by a summary action before the court of Session; and they are declared, by the statute, subject to no modification.

47. Criminal jurisdiction is founded, 1. *ratione domicilii*, if the defender dwells within the judges territory; for every criminal judge must have the power of punishing all offenders, subject to his jurisdiction. Vagabonds who have no certain domicile may be tried where-ever they are apprehended. 2. *Ratione delicti*, if the crime was committed within the territory, l. 28. §. 15. *de pen.*—*St. Gul.* c. 18. —1426, c. 90—1436, c. 148. *Et.* Treason, by the *English* law, behoved formerly to be tried in that county alone where it was committed; but by act 19mo Geo. II. c. 9. persons guilty of treason may be proceeded against, in such county as the King shall appoint; and where the crime is committed within certain counties in the Highlands of *Scotland*, it may be tried in any county where the court sits, 21mo Geo. II. c. 19. No criminal trial can proceed, unless the person accused is capable of making his defence. Upon this ground, absents cannot be tried; nor furious nor furious persons, *durante furore*, even for crimes committed before the fury. From a like reason, minors could not, by our old law, be tried criminally, till their majority, *R. M. L.*

3. c. 32. §. 15. but they have no such privilege, by our present practice.

The form of imprisoning criminals.

Prisoners may apply for liberation, in crimes not capital, upon bail.

In criminal accusations, they may insist to have their trial brought on.

48. No person can be imprisoned in order to trial for any crime, without a warrant in writing, expressing the cause, and proceeding upon a subscribed information, 1701, c. 6. unless in the case of indignities to judges, riots, and the other offences specially mentioned in the statute. Every prisoner committed in order to trial, if the crime of which he is accused be not capital, is intitled to be liberated upon bail, the extent of which is to be modified by the judge, not exceeding 6000 merks *Scots* for a Nobleman, 3000 for a landed Gentleman, 1000 for any other Gentleman or burghers, and 300 for any other inferior person, *ibid.*; which sums, to which the bail to be taken is limited, are doubled by 11mo G. L. c. 26. §. 11. That persons, who either from the nature of the crime with which they are charged, or from their low circumstances, cannot be liberated upon bail, may not lie forever in prison untried, it is made lawful by the said statute to every such prisoner, to apply to the criminal judge, that his trial may be brought on; and the judge must, within 24 hours after such application, under the pains of wrongous imprisonment, issue letters directed to messengers, for intimating to the prosecutor to fix a diet for the prisoner's trial, within 60 days after the intimation: and if the prosecutor does not insist within that time, or if the trial is not finished in 40 days more, when carried on before the Justiciary, or in 30, when before any other judge; the prisoner is, upon a second application, setting forth that the legal time is elapsed,

elapsed.

lapsed, intitled to his liberation, under the same pains of wrongous imprisonment.

49. Upon one's committing any of the grosser crimes, it is usual for a Justice of the Peace, Sheriff, or other Judge, to take a precognition of the facts, *i. e.* to examine these who were present at the criminal act, upon the special circumstances attending it; in order to know whether there is ground for a criminal trial, and to serve as a direction to the prosecutor, how to set forth the facts in the libel: but the persons examined may insist to have their declarations cancelled, before they give testimony at the trial. Justices of the Peace, Sheriffs, and Magistrates of burghs, are also authorised to receive informations, concerning crimes to be tried in the circuit-courts, which informations are to be transmitted to the Justice-clerk, 40 days before the sitting of the respective courts. This method of taking up of dittay, is substituted in place of the old one, by the stress and porteous roll, mentioned 1436, *c.* 139.—1487, *c.* 99. and is particularly set forth in act, 8vo *An. c.* 16. To discourage groundless criminal trials, all prosecutors, where the defender was absolved, were liable to pay the defender's expences, as they should be modified by the judge, 1587, *c.* 87; and besides, were subjected to a small fine to be divided between the fisk and the defender: and where the King's Advocate was the only pursuer, his informer was made liable in payment thereof, 1579, *c.* 78. These statutes sufficiently warrant the present practice, of deterring vexatious prosecutors in a pecuniary mulct, tho' far exceeding the statutory sum.

Precognition in order to tri-

Method of presenting to the circuit-courts.

Penalty of vexatious prosecutions.

50. The forms of trial on criminal accusations, differ much from those observed in civil actions, if we except the case of such crimes as the court of Session is competent to, and of lesser offences tried before inferior courts. The trial of crimes proceeds, either upon indictment, when the person to be tried is in prison; or by criminal letters issuing from the signet of the Justiciary. In either case, the defender must be served with a full copy of the indictment or letters, and with a list of the witnesses to be adduced against him, and of the persons who are to pass on the inquest, 1672, c. 16, §. 11. *concerning the Justice court*; and fifteen free days must intervene, betwixt his being so served, and the day of compearance. When the trial is upon criminal letters, the private prosecutor must find caution at raising the letters, that he will report them duly executed to the Justiciary, in terms of 1535, c. 35; and the defender, if he is not already in prison, is, by the letters, required to find caution, within a certain number of days after his citation, for his compearance upon the day fixed for his trial; and if he finds none within the days of the charge, he may be denounced rebel, which infers the forfeiture of his moveables.

Trial, either by indictment or criminal letters.

Caution to be found by the private prosecutor.

And by the defender.

Accomplices must be inserted in the body of the letters,

51. Formerly, accomplices in crimes or associates, were not cited in virtue of any special warrant contained in the criminal letters; their names were only inserted in a bill or writing to which the letters referred, and might be struck out at the messenger's pleasure. As this was too great a power to be committed to messengers, who frequently suffered delinquents to escape

escape for money, it was enacted by 1579. c. 76. that the whole persons to be cited, should be specially mentioned in the body of the criminal letters.

52. That part of the indictment, or of the Criminal criminal letters, which contains the ground of letters the charge against the defender, and the nature or degree of the punishment he ought to suffer, is called the libel. All libels must be special. setting forth the particular facts inferring the guilt, and the particular place where these facts were done. The time of committing the crime, may be libelled in more general terms, with an alternative as to the month, or day of the month: but, where the defender offers to prove *alibi*, the proof of the *locus delicti*, on the part of the pursuer, ought to be special. The necessity of special libels, obtained in our former law, not only in the trial of principal criminals, but of accessories: but, as it was not practicable, in most cases, to libel upon the precise circumstances of accession that might appear in proof; libels against accessories were declared sufficient, if they mentioned, in general, that the persons prosecuted were guilty art and part, 1592. c. 151. Except against accessories.

53. The defender, in a criminal trial, may Letters of raise letters of exculpation, for citing witness-exculpation. in proof of his defences against the libel, or of his objections against any of the jury or witnesses; which letters must be executed, to the same day of comparance, with that of the indictment or criminal letters. As the right of the defender to prove his defences, ought to be as ample and extensive, as that of the

the pursuer to prove his libel; letters of exculpation ought not to be refused on any relevant defence, tho' such defence should be inconsistent with the libel; otherways, libels might be so laid, as to cut off the defender from every article of exculpation.

Diets of
compear-
ance, are
perem-
ptory.

Deserting
of the
diet.

Form of
determi-
ning the
relevancy.

54. The diets of compearance, in the court of Justiciary, are peremptory; so that criminal letters must be called on the very day to which the defender is cited: otherways, their effect is lost, *instantia perit*, and new letters must be raised. If the pursuer does not compear on that day, or will not insist, or if any of the executions be found informal; the Lords desert the diet, by which the instance also perishes: but, if the pursuer should crave a delay, on account of the absence of a necessary witness, or for any other reasonable cause; the court may continue the diet to another day. A defender, who does not compear on the day to which he is cited, is declared fugitive; in consequence of which, his single escheat falls. The defender, after compearance in court, is called the pannel.

55. The two things to be chiefly regarded in a criminal libel, are, 1. the relevancy of the facts, *i. e.* their sufficiency to infer the conclusion; 2. their truth. The consideration of the first, belongs to the judges of the court; that of the other, to the jury or assize. In trials before the Justiciary, after hearing council on both sides upon the relevancy, informations *hinc inde*, were, by 1695. c. 4. directed to be offered to the court: but, by the late jurisdiction act, 20mo Geo. II. the judges, after the pleading, and minutes thereof made up by the clerk,

clerk, may furthwith pronounce their interlocutor; reserving power to them, in cases of difficulty, to direct informations, either on the relevancy of the libel, the import of a special verdict, the degree of punishment, or any other matter that may be alledged for the pannel, before judgment.

56. If the facts libelled are found irrelevant, the pannel is dismissed from the bar: if relevant, the court remits him to the knowledge of an assize. The word assize (from *assis*, settled or established) has different significations: it is sometimes taken for the sittings of a court; sometimes for its regulations or ordinances, especially these that fix the standard of weights and measures; and sometimes it signifies a jury, either because juries consisted of a fixed determinate number, or because they continued sitting, till they pronounced their verdict; see *Skene v. assisa*. A jury or assize consists of 15 sworn men (*juratores*) picked out by the court, from a greater number, not exceeding fourty five, 1579. c. 76.—1587. c. 88, who have been summoned for that purpose, by the sheriff, and given in list to the defender, at serving him with a copy of his libel.

57. Anciently, no person could be convicted of the smallest offence, till he was found guilty, by a jury of his countrymen: and tho' now, for more than a century backwards, it has been thought reasonable, that inferior judges might try lesser breaches of the peace *de plano*; yet, to this day, all prosecutions of crimes, of a higher nature, whether before the supreme or inferiour criminal courts, must proceed by juries; and no trial, even for a bloodwit

All crimes
must be
tried by
jury.

bloodwit or riot, if pursued before the Justiciary, can be carried on without a jury. In the trial of crimes, competent to the Session, the fifteen judges may well be considered in the character, both of court and jury.

The probation must be led before the pannel.

Extrajudicial confession.

Judicial confession.

58. The whole probation must be deduced in open court, to the assize, in presence of the pannel, 1587. c. 90. Crimes may be proved, either by the pannel's own confession, or by writing, or by witnesses. No extrajudicial confession, unless it is adhered to by the pannel, before the assize, can be admitted as evidence; which seems deducible from the statute last quoted. Judicial confessions, ought to be received with all the qualities the pannel has thought fit to adject to them; so that the prosecutor, who founds upon one part of it, must admit the whole to be true. Proof, by writing, is seldom used, except in usury, forgery and perjury.

What witnesses are habile, in criminal trials.

59. All objections, relevant against a witness in civil questions, are also relevant in criminal. *Socii criminis*, or associates in the same crime, are not received against one another, except either in crimes against the state, as treason; in occult crimes, where other witnesses cannot be had, as forgery; or in thefts or depredations, committed in the Highlands, 21mo Geo. II. c. 34. The testimony of the private party injured, may be received against the pannel, where the King's Advocate is the only prosecutor; if, from the nature of the crime, there must be a penury of witnesses, as in rape, robbery, &c. Where a crime is to be

be proved by a number of circumstances connected together, every one of which makes a part of the same criminal act, a single witness to each circumstance is sufficient evidence. But, it may be justly doubted, whether this ought to obtain in crimes re-iterated by different criminal acts; for, if a single witness be deemed sufficient in such case, for proof of each separate act, it would destroy one of the strongest checks, by which the testimony of false witnesses may be redargued. Crimes, which, by their nature, hardly admit of direct evidence, may be proved by presumptions; but, because of the severity of the conclusion in criminal trials, these presumptions ought to be so strong and violent, as necessarily to carry conviction along with them. Formerly, the depositions of witnesses, in all trials before the Justiciary or circuit-courts, were reduced into writing; but that practice is abolished, by 21mo Geo. II. c. 19. unless where the libel concludes death or demembration.

60. After all the witnesses have been examined in court, the assizers are shut up in a room by themselves, where they must continue, excluded from all correspondence, till their verdict or judgment be subscribed by their foreman (or chancellor) and clerk, 1587. c. 91.—1672. c. 16. art. 8. *concerning the justice court*; and, according to this verdict, the court pronounces sentence, either condemning or absolving. It is not necessary, by the law of Scotland, that a jury should be unanimous in finding a pannel guilty; the narrowest majority is as sufficient against the pannel, as for him. Juries cannot be punished on the ac-

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H h.

count

Must two
witnesses
always
concur to
every
act?

Proof, by
presum-
ption.

Verdict of
assize.

Affize of
error.

count of an erroneous verdict, either for or against the pannel; but they might, by our former law, for absolving him against evidence. This crime of wilful error in an affize, was tried by a grand affize, consisting of twenty five gentlemen possessed of land-estates; and was punished by imprisonment for a year, forfeiture of moveables and infamy. *R. M. I. 1. c. 14. §. 2. et seqq.*—1475. c. 64; but these grand affizes have been little used, see *Skene v. affisa*; and they are declared a grievance, by the convention of estates, 1689. c. 18.

The powers of a jury, in matters of law.

61. Tho' the proper business of a jury be to inquire into the truth of the facts found relevant by the court; for which reason, they are sometimes called the inquest; yet, in many cases, they judge also in matters of law or relevancy: thus, tho' an objection against a witness should be repelled by the court, the affizers are under no necessity to give full credit to his testimony. And, in all trials of art and part, where special facts are not libelled, the jury, if they return a general verdict, are really judges, not only of the truth, but of the relevancy, of the facts that are sworn to by the witnesses. A general verdict, is that which finds, in general terms, that the pannel is guilty or not guilty, or that the libel or defences are proved or not proved. In a special verdict, the jury finds certain facts proved, the import of which, is to be afterwards determined by the court.

General
verdict.

Special
verdict.

Execution
of sentences,
how limited.

62. That condemned criminals, whose cases deserve favour, might have an opportunity of applying to the sovereign for mercy, it was enacted,

enacted, that no sentence of any court of judicature, southward from the river *Forth*, importing either capital or corporal punishment, should be executed in less than 30 days; and if northward from it, in less than 40 days, *11mo G. I. c. 26.* This law, in so far as it concerns corporal punishments, less than death or dismembering, *e. g.* whipping, pillory, &c. is altered; so that judges may now inflict these, 8 days after sentence on this side *Forth*, and 12 days after sentence beyond it, *31io G. II. c. 32.*

63. Crimes are extinguished, 1. by a remission from the Sovereign. But a remission, tho' it secures the delinquent from the public resentment, the exercise of which belongs to the crown, cannot cut off the party injured from his claim of damages, over which the crown has no prerogative. Agreeably to this distinction, no person was allowed to plead a remission, till he had found security to satisfy or assyth the private party, *1457, c. 74. — 1528, c. 7;* and in the case of slaughter, the wife or the executors of the deceased, who were intitled to the assythment, behoved to sign letters of flains, acknowledging that they had received satisfaction, before any remission could be granted to the slayer, *1592, c. 155, No. 1.* Whoever therefore, founds on a remission, is liable in damages to the private prosecutor, in the same manner, as if he had been tried and found guilty. Even general acts of indemnity passed in Parliament, tho' they liberate from such penalties as law inflicts upon the criminal, merely *per medium paenae*, *1. July 1713, Stuart;* yet do not secure against the payment of any pecunial

Extinction of crimes, by the King's remission which does not cut off the right of the private party.

Acts of indemnity.

pecunial fine, which is given by statute to the party injured, 22. Feb. 1712, *Robertson*; nor consequently, against the demand of any claim competent to him, in name of damages.

By the parties forgiving the offence.

64. Lesser injuries, which cannot be properly said to affect the public peace, may be extinguished by the private party's expressly forgiving them, or even by his being reconciled to the offender, after receiving the injury. Hence arises the rule, *diffimulatio tollit injuriam*. But where the offence is of a higher nature, the party injured, tho' he may pass from the prosecution, in so far as his private interest is concerned, cannot preclude the advocate or procurator fiscal from insisting *ad vindictam publicam*.

By prescription.

65. Crimes are also extinguished by prescription, which operates by the mere lapse of time, without any act, either of the Sovereign or of the private sufferer. Crimes prescribe both by the Roman law, l. 12. C. *ad leg. Corn. de fals.* and by the custom of Scotland, see *Mackenz. Crim. Tr. Tit. Prescription*, in 20 years; but in particular crimes, the prescription is limited by statute to a shorter time. No person can be prosecuted upon the act for wrongous imprisonment, 1701, c. 6, after three years. High treason, committed within his Majesty's dominions, suffers likewise a triennial prescription, if indictment be not found against the traitor by a grand jury within that time, 7th *Gul. III. c. 3*. All actions, brought upon any penal statute made or to be made, where the penalty is appropriated to the crown, expire in two years after committing the offence: where the penalty goes to the crown or other prosecutor,

cutor, the prosecutor must sue within one year,
 and the crown within two years after that year
 ended. *3^{mo} Eliz. c. 5.* And this, tho' an
English act, affects *Scotland*, as it limits all the
 penal statutes passed since the union, which
 concern this part of the united kingdom. Cer-
 tain crimes are, without the aid of any statute,
 extinguished by a shorter prescription than 20
 years. By our old law, *R. M. l. 4. c. 110.* in
 the cases of rape, robbery and hamefucken,
 the party injured was not heard after a silence
 of 24 hours, from a presumption, that persons
 cannot be so grossly injured, without immedi-
 ately complaining: and it is probable, that a
 prosecution for these crimes, if delayed for a-
 ny considerable time, would be cast even at
 this day, or at least the punishment restricted.
 Lesser injuries suffer also a short prescription;
 law presuming forgiveness, from the nature of
 the offence, and the silence of the party. The
 particular space of time sufficient to establish
 this presumption, must be determined by the
 judge, according to circumstances.

F I N I S.

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A.

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